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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 175.

The Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

SAMUEL WRIGHT AND EDWARD B. TAINTER,

Appellants,

vs.

THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEES.

WILLIAM D. MITCHELL,
Solicitor for Appellees.

JARED HOW,
CARL TAYLOR,
TIMOTHY R. PALMER,
Of Counsel.

17071

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 178.

SAMUEL WRIGHT AND ESDRAS B. TRUBEY,

Appellants.

vs.

THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

For convenience in arrangement the facts will be stated under three heads, viz.: I. The History of the Company. II. The History of plaintiff's connection therewith. III. The history of this litigation. The assignments of error (R. P. 757) indicate that appellants' principal grounds of complaint are a change in the Company's manner of doing business, made on or about January 1st, 1899, and a further change made on or about August 5,

1901. The history of the Company, therefore, naturally falls into three periods, 1. The First Period, from the time plaintiffs became members down to January 1st, 1899, the time of the first change complained of. 2. The Second Period, from January 1st, 1899, down to August 5th, 1901, the date of the second change complained of, and 3. The Third Period, from August 5, 1901, until the present time.

I.

The History of the Company.

1. *The First Period.*

The defendant corporation was organized in 1880 under the laws of the State of Minnesota. The statute under which the Company operated prior to August 5, 1901, is Chapter 184 of the General Laws of Minnesota for the year 1885. The Company accepted the provisions of this act on November 28, 1890 (Exhibit B. Rec. p. 294). So much of this act as is material is printed in the appendix to this brief. As the appellant Wright became a member on December 10, 1892 (Rec. p. 207-8), and the appellant Trubey on March 13, 1893, (Rec. p. 255), it is not necessary to consider any transactions nor the provisions of any articles or by-laws in force prior to the earliest of those dates. On November 21, 1892, prior to the time either of the appellants became members, the Company, then called the Bankers Life Association, adopted amended Articles (Exhibit "C," Rec. p. 301). These articles with some

unimportant amendments were in force until December 24, 1898.

The character of the corporation at the time appellants became members is fully disclosed by this Exhibit "C," and the statute referred to.

It was a cooperative assessment life insurance Company, the general plan of its operation being "to assess and collect from its members and thereupon pay over to the families of its deceased members, or other designated beneficiaries, stipulated sums of money."

By Article IV each member, on becoming such, was required to pay the following sums of money: "First, as many dollars as he is years of age (counting to his nearest birthday) as his deposit in the guaranty trust fund of the association, which fund shall be a pledge to secure payments to be made by this association for death of members, and shall belong to the association; Second, a membership fee equal to half his guaranty deposit. Third, his proportion of the annual expense assessment for the Company's current fiscal year."

By Article VI it was provided that "each member of this corporation shall pay thereto on the last secular day of September in each year, an assessment equal to fifteen per cent on his contribution to the guaranty trust fund to meet the operating expenses, and to be known as his annual dues, and upon the death of any member each surviving member shall also pay to said corporation, on demand, an assessment equal to two per cent on his contribution to said guaranty trust fund, and out of the sum

obtained from said last named assessment, which shall be known as the mortuary assessment, there shall be paid to such beneficiary as is designated in the membership certificate the sum of money in the said certificate named." It further provides that if the assessments shall produce an amount in excess of the amount necessary to pay death losses, such excess may be used to pay death losses subsequently accruing, "provided that the board of trustees may in their discretion retain in such mortuary fund such amount as will in their judgment most increase the efficiency of the corporation and secure the prompt payment of death losses."

Article VII provided "all membership fees and annual dues shall be used to defray the current expenses and to increase its efficiency and protective capacity, and the residue thereof, if any, may be used to pay death losses."

Article X was as follows: "All amounts pledged to this company to secure payment of assessments occasioned by death of its members, shall be used only for that purpose, and meanwhile the same shall be and remain invested in United States registered bonds, and shall constitute and be known as the 'guaranty trust fund.' Such bonds shall be made payable to this company, and shall be transferable or convertible only upon resolution of its board of trustees, and such board shall have the exclusive charge and control thereof.

All interest realized from such bonds shall meanwhile be used to defray the company's operating expenses.

This article shall never be amended, or in any way at all changed, without the consent of every member of this company, to be given in writing signed by him, and filed with the company's secretary, and reciting in full the proposed amendment or change."

Article XII provided that upon the death of a member his beneficiary shall receive "a sum equal to two per cent of the then subsisting guaranty trust fund, not exceeding however two thousand dollars upon each full membership."

Article XIII provided that "the annual dues of each member shall be paid to this company, at its office in St. Paul in the State of Minnesota (or at the proper depository for it) on or before the last secular day of September in each year and *without demand therefor.*"

Article XIV placed the governing power in the hands of a board of five trustees elected by its members.

Among the enumerated powers of this board are "to establish by-laws and make all rules and regulations deemed by them expedient for the management of the affairs of this company in accordance with law and not incompatible with an honest purpose," and also "*to amend these articles (except as therein otherwise provided) and to generally direct, manage and control the business and concerns of this company.*"

The only provision in the articles against amendment by the trustees is in Article X above quoted.

The form of the membership certificates issued

by the Company under these articles, known as "Mortuary Assessment Certificates" is found in complainants' exhibits "H" and "I" (Rec. p. 207-8, 390).

The funds of the company were carried on its books under various heads. These were

First the "Guaranty Trust Fund." This consisted of the deposits made by members on their becoming such, as provided by Articles IV and X of the Articles of Association (Exhibit "C" Rec. p. 301, 304). As a matter of bookkeeping merely this fund was carried under two divisions, 1st, The Guaranty Trust Fund proper, in which was included the deposits of all members who had not lapsed or deceased, and 2nd, The so-called Mortuary Reserve Fund under which was included the deposits of deceased and lapsed members (R. p. 104-5, 393 4). These two divisions were always treated as one fund, and put to the same use (R. p. 397-8).

No part of the Guaranty Trust Fund, (including the so-called Mortuary Reserve Fund) has ever been used or applied to any purpose other than the payment of death losses among the holders of mortuary assessment certificates, (R. p. 109-10, 112, 422-3).

Second. The "Mortuary Fund" made up of the proceeds of mortuary assessments and transfers from the Guaranty Trust Fund (R. p. 108-9). Against this fund was charged only the amount of death losses paid.

Third. "The Operating Fund" made up of membership fees, annual dues, and interest on Guaranty Trust Fund government bonds (R. p. 105). Against this fund were charged the operating expenses and portions of it remaining at the close of the fiscal year were transferred to the contingent fund under that provision of the charter in Art. VII providng that after paying operating expenses the balance of membership fees and annual dues should be used to promote the efficiency of the Company.

Fourth: The "Contingent Fund" made up of miscellaneous interest receipts (R. p. 115), and the transfer of balances from the operating fund. Against this fund was charged depreciation of Guaranty Trust Fund securities and miscellaneous expenses.

During the year 1898 it became apparent to the officers and trustees that in order to put the Company on a permanent and stable basis a change in the manner of doing business must be made. The Company was making no headway, the average age of its members and the death rate were increasing, and no growth was shown in the amount of business. The conditions which made this change essential were those common to all cooperative assessment companies. A substantial increase in the assessments was inevitable. The experience of assessment companies had shown that when this stage was reached and the increasing average age and death rate brought about increasing assessments, the younger members would drop out, leaving behind the older

members and impaired risks, and the assessments on the other members would become too burdensome, and members who had been paying for years would finally be left without insurance. The history of assessment insurance in this country is a history of failures. The story is told in the testimony of Mr. S. Herbert Wolfe, (Rec. P. 474-503) one of the leading actuaries of the country and in that of Mr. Dearth, Insurance Commissioner of Minnesota, (Rec. p. 440-461). The reason for this is stated by Mr. Dearth as follows:

"My observation and knowledge acquired from the investigation of these companies and through the results shown by their sworn annual statements filed with the insurance department, show that the plan of assessment insurance whereby simply sufficient amounts are collected from the members to meet the current mortality cost, as the same accrues, finally results,—universally—in placing the companies in a financially embarrassed position; for the reason that as the average age of the policy holders or members increases the liability for death—in other words the mortality cost increases at such a rapid rate that it necessitates very heavy additional assessments levied as to result in the retirement from the membership of the younger ages who are in good health, and can secure reliable insurance in old line or legal reserve companies, leaving only those who have either reached the prohibitive age limit or are uninsurable owing to ill health, unduly increasing the mortality cost, rendering it practically impossible for those remaining to meet their un-

due heavy assessment obligations, and as a consequence the company inevitably goes to the wall financially." (Rec. p. 446.)

Mr. Wolfe says: "The natural operation of the laws of mortality the fact that assessment associations are less stable and less reliable than legal reserve companies, and the fact that when the premiums are advanced those insured who are in good insurable health drop their policies and go into level premium companies leaving a class of risks which unduly increase the mortality cost of the association." (Rec. p. 492, 500.)

That was exactly the condition which confronted this company in 1898. Mr. Palmer, the president of the company, says (Rec. p. 382):

"For several years prior to 1898 the records of the company and its experience disclosed the fact that the mortality rate was rapidly increasing, while the aggregate amount of insurance in force was not materially increasing, but in fact in some years was decreasing, and that the average age of the members was gradually increasing, although the best efforts which its officers could put forth to secure new business were put forth; and it was apparent that there would be an increase in the number of assessments which would be necessary to care for the death losses in the future. Moreover insurance journals throughout the country were constantly and bitterly attacking the plan of assessment insurance. The insurance departments of the several states were very much opposed to assessment insurance, and in their annual reports almost without exception referred to

assessment insurance as not feasible; and a large number of assessment insurance companies had failed, and were failing from year to year, until assessment insurance was made exceedingly unpopular in the minds of the public, and very unsafe. Some of the legislatures adopted legislation hostile to assessment companies. In the State of Massachusetts the writing of assessment insurance was prohibited by the legislature."

The data given in the record sustain these several statements (Rec. p. 382). In 1892 the total amount of insurance in force in defendant company was $25,404,000. By 1894 it had fallen to $23,486,000. In 1895 there was a slight increase to $24,626 000, but by December 31, 1898, it had fallen to $24,180,000. The company's new business was unable to keep pace with the tremendous lapse, and it must be remembered that the lapse is always among the *young members and desirable risks.* Furthermore (Rec. p. 389) in 1892 with a total insurance of $25,404,000 the number of certificates ceased by death was 75. In 1893 with a total insurance of 23,678,000 the number of certificates ceased by death was 114. In 1898 with a total insurance of $24,180,000 the number of certificates ceased by death was 143. The mortality was therefore increasing at a tremendous rate.

It is not necessary to discuss these conditions further. It conclusively appears that a continuation of the company's method of doing business could only have one result. The fault did not lie with the corporation. The trouble was with the

membership who would not do their part (Rec. p. 391). If required to pay the cost of their insurance the younger members would drop out, and the older members would be unable or refuse to pay the increased assessments. The mortuary assessments would not produce enough to pay death losses, and the Guaranty Trust Fund would be drawn on until it fell below $100,000, so that 2 per cent of it (the amount which the company was obligated to pay to the beneficiaries of deceased members) would be less than $2,000. This fund would soon be wiped out entirely, and the beneficiaries of the members remaining would receive little or nothing.

2. *Second Period.*

It was therefore necessary to induce the membership, before it was too late, to consent to immediately place their insurance on a basis where they would be paying at once the cost of their insurance, and place it on a sound and permanent basis. Accordingly on December 24, 1898, the board of trustees, pursuant to the power of amendment vested in them by the Company's charter, adopted amended articles of association, and a set of by-laws, still under the provisions of chapter 184 of the laws of Minnesota 1885. The amended articles are set forth as defendant's exhibit "D" (Rec. p. 308), and the by-laws immediately following (Rec. p. 313). An examination of these articles shows that the character of the Company as an *assessment* company was unchanged. By Section III it was provided that "payments in

advance at stated times of specified premiums or assessments may be provided for, but the insured's liability to contribute to the payment of policy claims or death losses shall not be limited to a fixed sum." The articles are very general in terms and contemplate that the exact manner of transacting its business shall be provided for in the by-laws.

Article VIII provided that the annual meetings of the members shall be held at such times and places as the by-laws shall provide.

Article IX provided that the "*by-laws shall contain provisions which shall operate to preserve, continue, guard and protect all of the existing rights and privileges of, and promises and pledges to, persons who are members of this association at the time of the taking effect of these amended articles and articles of reincorporation*, and to preserve, continue and enforce all of the present duties, obligations and promises and agreements of said members to the association, except in so far and in such respects as the necessity or the general good and welfare of the membership of the association as a whole shall require changes in or relinquishment of the same."

Article X continued in force unchanged the article X of the former charter relating to the inviolability of the Guaranty Trust Fund.

Article XI continued in force the former provision authorizing the amendment of the articles, and authorized the trustees to make by-laws.

The by-laws passed pursuant to these articles divided the membership into classes. "Class A" consisted of all members who became such or applied

for membership prior to January 1, 1899, together with the members who thereafter applied for membership, upon substantially the same terms and conditions, and who received certificates substantially the same in form and substance as those who became members prior to the first day of January, 1899" (Art. V). All members to whom should be issued other forms of policies constituted one or more additional classes (Art. IV).

It was also provided (Art. V., Rec. p. 318) that "any member of Class A shall at all times be entitled to exchange his certificate or certificates of membership policy or policies for any other form of policy then being issued by this Company, upon such just and equitable terms and conditions as the board of trustees shall from time to time prescribe." It appears that all the provisions of the articles of 1892 relating to the mortuary assessment certificates, and the manner of levying assessments, &c., are incorporated into these by-laws.

Article I fixed the date of the annual meeting as the first Monday in August at the home office in St. Paul. Shortly after these articles went into effect the solicitation of new business on the mortuary assessment certificate plan was discontinued, and no new business on that plan has been solicited since March 1899. From that time on until 1901 the efforts of the Company were mainly directed to "transferring" members. That is, to soliciting members to surrender their mortuary assessment certificates and accept in lieu thereof the new forms of policy called the "Guaranteed Option Policy"

(Rec. p. 409-411). The writing of new business commenced again in 1901 (Rec. p. 174). Some of the forms of the so-called "Guaranteed Option Policies" issued to transferring members and new members since January 1st, 1899, are in the record (Complainants' Exhibit "C", Rec. p. 31), (Complainants' Exhibit "D", Rec. p. 189). These policies required the payment by the insured of a stipulated annual premium in advance. The premium rates were based on the Experience Tables of Mortality, and were almost but not quite the rate which would have been charged if the Company had been on an "old line" or legal reserve basis (Rec. p. 512), and in other respects these policies greatly resemble policies issued by legal reserve companies. For example, in complainants' Exhibit C (Rec. p. 31 it appears that Mr. Newkirk, age 46, was charged an annual premium of $32.50 per thousand, on what was substantially a whole life policy after the first year, on a 4 per cent basis. The net premium rate (Combined Experience Table) on a 4 per cent basis, age 46, is $30.08 per thousand (Rec. p. 485 6, 512). The net premium does not include the "expense loading" (Rec. p. 486), so that Newkirk's expense loading was only $2.23 per thousand or 7 per cent of the net premium rate. (Figured according to the American experience tables it would be 13 per cent Rec. p. 512), while the usual expense loading is from 15 per cent to 35 per cent. So that these rates were substantially the same as "old line" rates, except that the expense loading was more moderate. But in the tenth paragraph of the policy Exhibit D (Rec.

p. 192) is found the following clause:

"The company agrees to hold for this policy, and each similar policy, the full reserve computed as below provided, according to the combined experience table of mortality, on the basis of four per cent compound interest, provided however that if the funds derived from such policies shall be reduced below the amount of said reserve *the company may require the insured under this and each similar policy to pay his just proportion of the deficiency within sixty days after written request therefor; or at the option of the company such proportion with compound interest thereon at the rate of 4 per cent per annum may be charged as a lien against the policy and any sum which shall become payable thereunder.*

And in the other policy (Comp. Ex. C., Rec. p. 31) in the eleventh paragraph (Rec. p. 34) is found a similar agreement to maintain a reserve, with the proviso that "if unexpected losses and expenses shall be found to have reduced the funds derived from such policies below the amount of said reserve, the company shall have the right to apportion the deficiency ratably against this and each similar policy, in proportion to its reserve, and the amount so apportioned against each policy shall be an indebtedness thereon, bearing interest at 4 per cent per annum until paid off by dividends or otherwise."

And in paragraph nineteenth "The present and future articles of incorporation and by-laws of this company are hereby made a part of this policy."

At the close of the year 1898 the amount of insur-

ance in force, all on the mortuary assessment certificate plan, was $24,180,000 (Rec. p. 382). By December 31, 1899 the amount of insurance in force on the "Guaranteed Option Policy" plan upon the lives of members who had formerly held mortuary assessment certificates, that is the amount of insurance in force held by "transferred" members, was $3,859,500. By December 31, 1900, it was $9,142,000. By July 31, 1901, it was $11,001,500 (Rec. p. 398).

On July 31, 1901, the total amount of insurance in force on the mortuary assessment certificate plan was $4,376,000, and was being rapidly reduced by transfers (Rec. p. 408).

The total amount of insurance in force July 31, 1901, on the "Guaranteed Option Policy" plan was $11,125,000. Of this $123,500 was new business, and the rest (Rec. p. 398) transfers, so that between December 31, 1898, and July 31, 1901, there had been transferred more than $11,001,500 of insurance (these figures for 1901 show merely the amount of transfers then in force; some of the transferred members had of course lapsed or deceased), while the total amount of mortuary assessment certificate insurance was reduced by transfers, *lapses* and *deaths* from $24,180,000 on December 31, 1898, to $4,376,000 on July 31, 1901 (Rec. p. 408, p. 382, 398).

The total amount of insurance in force, of all kinds, dropped from $24,180,000 on December 31, 1898, to $15,501,000 on July 31, 1901, a net shrinkage of $9,679,000. An effort was made by com-

plainants to show that the system of transferring caused this large lapse. The evidence is conclusive however, that this was not the cause. Undoubtedly the change of plan inaugurated by the Company made some members uneasy, and caused them to drop out. But the record shows (p. 382) that during the years 1894-5-6-7-8, *prior to any change of plan*, the lapses amounted to an average of over $3,400,000 per year. During those years the writing of such new business as the Company could get helped to offset this lapse. But during the years 1899, 1900 and 1901, the Company was compelled to devote its attention mainly to transferring members, consequently if this lapse of former years had continued in the same proportion it would have amounted between December 31, 1898, and July 31, 1901, to more than $10,000,000, which would alone account for the net loss in amount of insurance in force. Furthermore, the record shows that the literature distributed and attacks made on the company by the very persons back of this litigation undoubtedly increased the amount of lapses (Rec. p. 395-6), a subject which will be referred to more at length hereafter.

To return to the transfers.

Every member was given an opportunity to transfer on uniform terms, varying of course in each case according to the age of the respective members, and the length of time they had been members (Rec. p. 386, 387). The old members were given the same rates in proportion to their age as the young. The

members were all informed that it was for the best interests of the Company that the transfers should be made, but they were also informed that if they desired to retain their old certificates they could do so, and their contracts would be carried out by the company, (Rec. p. 387, 388). The position of the company on this point is clearly shown by the circular sent to all the members holding mortuary assessment certificates (Rec. p. 388, Dfts. Exh. 44 Rec. p. 465-6). Members have always been and still are permitted to transfer at pleasure (Rec. p. 386). No discrimination of any kind was made, old and young were solicited alike (Rec. p. 385-6). No medical examination was required. The attempt of the complainants to show that the efforts of the company were directed to transferring the desirable risks, with the object of leaving the older and impaired risks behind failed. On the contrary a special plan was adopted to help the older members to make the transfer (Rec. p. 386). The manner in which these transfers were made is set forth in Mr. Palmer's testimony (Rec. p. 384 388). The original plan is shown in the record (Rec. p. 120-121). This plan was modified (Rec. p. 121). The form of policy adopted at first required the transferring member to pay a premium based on his attained age at the date of his transfer. This rate of course was a large increase over the amount the member had theretofore been paying on his mortuary assessment certificate and especially so in the case of the older members. In order to make the burden as light as possible, under the actuaries' advice, a credit was allowed

each transferring member, to be applied in reduction of premiums on the new policy from time to time as the premiums were paid, but no credit was allowed on any one premium for more than half the premium. In the case of lien policies the credit was applied on the lien. The company started on its books what was called the "Premium Fund" (Rec. p. 143). The total amount of credits allowed each transferring member was equal to the amount of his deposit in the Guaranty Trust Fund and interest.

The amount of the credit however was not charged against the Guaranty Trust Fund, but was charged to the Contingent Fund and credited to the Premium Fund, as the other half of the premiums was paid (Rec. p. 144, 123). As it was extremely burdensome to the old members to pay premiums based on their attained age at the time of the transfer, what was known as a lien policy was devised (Rec. p. 386, 394, 387). Copies of the applications for lien policies are found on pages 91 and 187 of the Record. By this method the new policy issued to the transferring member was dated back to the date of his original mortuary assessment certificate. The premium was accordingly based on the age of the member at the time he took out his old certificate. As this policy by its terms required of the company the maintenance of a 4 per cent reserve from the date of the policy, which of course the company had not in fact received, it was consequently necessary to charge against the policy so dated back, a lien equal to the reserve which would have accumulated had

the members in fact been paying the level premium stipulated in the policy from its assumed date (less the special credit referred to). This lien was of course consented to by the member in his application for transfer.

It is conclusively shown by the evidence that the transfer of members was carried out fairly and equitably (Report of Ins. Com. p. 467-472). The method of prorating the operating expenses of the company among the mortuary assessment certificate holders on the one hand, and the Guaranteed Option Policy holders on the other is a fair example of the careful treatment of those members who elected to retain their old certificates. This is fully described on pages 402-408 of the Record. All expenses pertaining solely to the mortuary assessment certificates were charged to them. All expenses relating solely to the Guaranteed Option Policies were charged only to them. Those expenditures made for the benefit of both classes were prorated according to the total amount of insurance in force in each class from month to month. All doubts were resolved in favor of the holders of mortuary assessment certificates (Rec. p. 403). It will be remembered that the Operating Fund was made up of membership fees and dues from the mortuary assessment holders, and the Premium Fund from the contributions of the holders of new forms of policies. For example, the expenses of 1901 were $136,349.47. Of this, all commissions, agency expenses, rent of agency offices, and the entire cost of all new business and transfers, amounting to $91,721.72, were

charged direct to the Premium Fund (contributed by G. O. P. holders). Only $790.95 was charged direct to the Operating Fund (Mortuary Ass. Cer. holders) The balance $43,836.80, which covered certain expenses of the home office was prorated among the two classes in proportion to the amount of insurance in force in each. The operating fund paid $13,633.22, and the premium fund $30 203.58. So that of a total expense of $136,349.47 only $14,424.17 was charged to holders of the mortuary assessment certificates, and that amount represents but 31.1 per cent of a portion of the expenses of the home office.

At the time the testimony was taken in May, 1902 the average age of the then holders of mortuary assessment certificates was 54 years. On December 31, 1898, it was 46.12 (Rec. p. 392). As no new business was added to this class during that period over three years of this increase is accounted for by mere lapse of time. Complainants attempted to account for the increase by charging it to the transfer of young members. But the evidence does not substantiate this claim. On the contrary it shows that this increase is due to the tremendous number of lapses, which had been continuing since 1894 at the rate of $3,400,000 per year. It was for the very purpose of guarding against the effect of this tremendous lapse and increase in average age, which was plainly imminent in 1898, that the plan of transfer was inaugurated. It is a well known fact that the lapses are always principally among the younger members and unimpaired risks. If the company

had continued under the old plan the great number of lapses, the increase in mortality and consequent increase of assessments, would have driven out the younger members entirely, and left none but the old and impaired risks, and the average age of the assessment certificate holders would have been greater than it is today.

3. *Third Period.*

By the middle of the year 1901 the company had succeeded in getting most of its business onto a level premium basis, and the progress being made in transferring members indicated that the remaining insurance on the old plan would soon be all transferred. But the company *was unable to make satisfactory progress in the acquisition of new business.* The reasons for this are plain.

The company was still an assessment company. It was operating under a statute which related solely to assessment companies. In order to comply with the law, and make the policies assessment contracts, it had been necessary to insert in the Guaranteed Option Policy the "safety clause" above referred to. Although the premium rates on these policies were based on the mortality tables and together with the additional premium payments by the policy holders, were sufficient to mature the policies, and it was not contemplated that the company would ever have to ask for increased premiums the effect of such a safety clause on a prospective new member is apparent. The agents of competing old line com-

panies had merely to call attention to this clause, and the fact that the policy holder would pay substantially old line rates, *with the possibility of being called on for more*, to defeat the company's efforts to get new business. Furthermore, the business of assessment insurance had fallen into disrepute, was regarded unsafe, and was hindered by adverse legislation and rulings of insurance departments (Rec. p. 382, 498, 499). It was necessary for the company to be able to hold itself out as an old line company in order to get new business.

Accordingly under the advice of the Insurance Commissioner and the actuaries, steps were taken to place the company on an old line basis.

The legislature of Minnesota, recognizing the necessity of this move on the part of assessment companies, had provided for it by statute, as had the legislatures of many other states.

In 1895 the Minnesota legislature had passed "an act to revise and codify the insurance laws of the State" (Chapter 175 Laws 1895). This act is very long, and it is unnecessary to set it out in this brief. In 1901 the legislature amended this code so as to authorize assessment companies to go onto the old line or legal reserve basis. This act is chapter 143 of the laws of 1901, approved April 6, 1901. It is set forth in full in the appendix to this brief. The amendments to the act of 1895, in so far as they are material in this case are italicized. This act authorized any assessment company to accept the provisions of the act and qualify on a legal reserve basis (provided of course it had sufficient assets) by a

two-thirds vote of all votes cast by the members, at any special meeting called for that purpose, or by a similar vote at any regular annual meeting, "provided (Sections 21 and 63) that nothing herein contained shall impair or operate to impair the obligation of any contract"; and further that every assessment contract or policy issued prior to such change must be carried out and fulfilled according to its terms "subject to change by the parties thereto." Also that in determining the statutory reserve liability of the company, the insurance commissioner should value its old assessment contracts as one year renewable term policies. The defendant company, at a regular annual meeting of its members held on August 5, 1901, (the time fixed in the by-laws) of which notice was given to all members (Rec. p. 415, Rec. p. 131-132, 184), accepted the provisions of this statute. The record of the meeting is shown on Record pages 362-6.

Of a total of $15,501,500.00 insurance in force on July 31, 1901 (Rec. p. 134), there was represented in person and by proxy at this meeting $9,265,000. The resolution accepting the provisions of the law of 1901, was passed by a vote of $9,213,000 in its favor, and four votes (one ballot) representing $4,000.00 against it. Each $1,000 of insurance cast one vote (By-laws, Sec. 3, Rec. p. 314, 375-6).

It is undisputed that the formal requirements of the law were complied with in every particular. The name of the company was changed to The Minnesota Mutual Life Insurance Company. The amend-

ed articles appear as defendant's Exhibit E (Rec. p. 324-326, p. 365).

On August 9, 1901, pursuant to the amended articles, the board of trustees adopted amended by-laws (Rec. p. 366-367-8), Exhibit F. (Rec. p. 326-328). The articles are general in terms, and of course retain the mutual feature.

Article X of the former articles, relating to the Guaranty Trust Fund, was continued in force by Articles IX and X of the new articles (Rec. p. 325).

The by-laws give the members the same voice as before in the affairs of the company, and Article IV, Sec. 1 is as follows (Rec. p. 328):

"Section 1. To the extent necessary to protect and continue the rights and privileges of any member holding a mortuary assessment certificate and to preserve and secure the fulfillment of all contract obligations to him, and to continue and perpetuate in the company the power and authority to levy assessments, and to do and perform all and everything necessary or expedient to enable it to carry out the mortuary assessment contracts in accordance with the terms thereof, and with the law and present by-laws in such case made and provided, the present and existing by-laws shall continue in full force and effect."

Since August 5, 1901, the company has been doing business under the amended articles and by-laws. All new policies have of course been issued on a legal reserve basis.

The transfer of members from the mortuary assessment certificate plan has continued as before

(Rec. p. 385-6), except that the new policies issued in exchange since August 5, 1901, have not contained the "safety clause" found in the Guaranteed Option policies issued prior to that date.

The amount of mortuary assessment certificates in force was reduced by transfers, lapses and deaths from $4,376,000 on July 31, 1901, to $2,835,000 on December 31, 1901 (Rec. p. 408). By May 31, 1902, the amount had fallen below $2,300,000 (Rec. p. 433). Though the record does not show the exact figures, it is only fair to assume considering the rate at which these transfers were being made at the time the last testimony was taken that the amount of the mortuary assessment certificates in force has now been reduced by transfers, deaths and lapses to less than $450,000, and it is only a question of a short time when they will disappear altogether. The company has of course faithfully carried out its contracts with all the remaining members on that plan, has levied assessments as provided by the by-laws, and kept all the machinery relating to these contracts in motion. Every death loss has been paid in full, (Rec. p. 432-451). There has been an increase in the number of assessments, (Rec. p. 389) but the evidence shows and the lower court found as a fact (Rec. p. 747) that "this was exactly what was to be anticipated from the very nature of the association, and it cannot be justly claimed that the increase in the assessments is attributable to the change in the method of doing business. At the present time there is no complaint that these assessments are unreasonable,

On the contrary, the evidence plainly shows that they are in themselves insufficient to pay the cost of the insurance granted under the old contracts."

To be more specific on this point let us examine the evidence in detail. It must be remembered that by the terms of the articles (Exhibit C., Rec. p. 301-2) *one mortuary assessment* was to be levied for each death. The table showing the number of deaths and number of assessments in each year (Rec. p. 389) shows that the company has never since 1886 levied the full number of assessments which its members might have been required to pay. The record shows (p. 377) that the total payments of every nature made by complainant Trubey during the nine years his certificates were in force from March 13, 1893, to April, 1902, on $6,000 of insurance, age at entry 40 years, was $1,035. The table of *net* annual premiums (Rec. p. 508) shows that the net annual premiums (without expense loading) on a level premium basis, for $1,000, age 40 years, is $23.68, so that the total net premiums for nine years on $6,000 would amount to $1,278.72. Add to this 15 per cent for expense loading (which is very low, as the expense loading runs from 15 per cent to 30 per cent) makes the total amount which Trubey would have had to pay on a level premium basis, to pay the cost of his insurance, $1,470.52, so that to April, 1902, he has paid $335.52 less than the cost of his insurance on a level premium basis. As it is inevitable that the cost of his insurance must be paid by him sooner or later, it would follow that under the inexorable laws of mortality he would be re-

quired to pay increased assessments in the future. This demonstrates that any increase in his assessments which has heretofore taken place (and which was very moderate Rec. p. 377) has been only the inevitable result of the assessment system. After the amendments of August 5, 1901, were made, it took some weeks to prepare forms of policies, tables of rates, etc., so that the writing of new business on "old line" plan did not begin in earnest until January 1, 1902 (Rec. p. 434). At the time of taking the testimony in the spring of 1902 new business was being written at the rate of two millions a year, and the volume of new business was increasing every month (Rec. p. 435). The company is licensed and is doing business in twenty-one states (Rec. p. 433-4). It is the undisputed evidence that the company is in a prosperous condition, and it was so found by the Court. The evidence shows and the Court so found that the value of mortuary assessment certificate contracts had not in fact been impaired by the change, but had been increased in value and stability.

II.

History of Complainants' Connection With the Company.

This suit was originally instituted by J. C. Iverson and Samuel Wright. Iverson shortly afterwards withdrew (Rec. p. 100) and the complainant Trubey intervened and was substituted (Rec. p. 59, 60, 61, 62).

1. Samuel Wright became a member December 10, 1892 (Rec. p. 197). Two certificates were issued to him (Rec. p. 207-8). He continued to be a member until October, 1899, (Rec. p. 215, complainants' Exhibits "N" and "P"). The statement of all payments made by him is in the Record (Rec. p. 375).

Mr. Wright states that in October, 1899, a representative of the company called on him and informed him of the change of plan inaugurated by the company (Rec. p. 199-200), and the fact that transfers were being made, and he was solicited to transfer. The written details of the plan were left with him (Rec. p. 199. Exhibit "NN", p. 215). Further details were given him on December 12, 1899. (Ex. "O", p. 218). Mr. Wright says he told the agent he did not desire to embrace the new plan, and that he would terminate his connection with the company and look elsewhere for his insurance (Rec. p. 201).

On December 13, 1899, in response to a letter of December 12, 1899 from the company's representative explaining further the plan of transfer (Ex. "O", p. 218), Mr. Wright wrote as follows (Rec. p. 201, Exhibit "P", Rec. p. 215):

"Yours of the 12th at hand contents noted. I see no reason for changing my mind since I saw you two or three months ago. I shall adhere to my then determination which was to cancel."

It will be noted that the agent's *letters* to Mr. Wright, which are tangible evidence, differ very materially in tone from Mr. Wright's claims as to what the agent stated to him orally.

On June 4, 1900, he wrote the company as follows

(Rec. p. 215, Ex. "N"):

"In October last I ordered your state manager, Mr. E. W. Leonard, to cancel my certificates of policies Nos. 10608 9 at once as I did not desire to embrace your new plan. At that time he gave me a statement showing that I had coming to me the sum of ($137.00) one hundred and thirty-seven dollars.

"I now demand of you the return to me at once of the above amount with interest thereon together with any other sum that may be due me from your Company."

This $137.00 which he thought was "due" him was merely the special credit to be allowed on the premiums of the new policy in case he transferred.

Mr. Wright therefore elected to abandon his contract with defendant company, and terminate his connection therewith in October, 1899, nearly two years before the company went onto the "old line" basis, and just two years before this suit was instituted, had full information of the change of December, 1898, and the fact that transfers were being made and that the company had ceased to write business on the old plan. He never paid any dues or assessments after that date (Rec. p. 374-5). On December 4, 1899, a mortuary assessment was levied on the members (Rec. p. 368-9-370). Due notice of this assessment was given Mr. Wright (Rec. p. 370-1-2-3-4, Exhibit 42; Rec. p. 462 3-4) in accordance with the articles and by-laws. The amount of Mr. Wright's assessment due January 3, 1900, was $16.-40. He never paid this amount (Rec. p. 374-5).

2. Complainant Trubey became a member March 13, 1893 (Rec. p. 231). Three certificates

were issued to him (Rec. p. 231, Exhibit "B", Rec. p. 255). He states that knowledge of the fact that the company had changed its plan and was transferring members was given him in either the latter part of 1899 or the first part of 1900 (p. 234). The details of the plan were laid before him at that time and he was solicited to transfer (Rec. p. 234).

Further information was given him in February and March, 1901, (Ex. "F" and "E", Rec. p. 257-8). He therefore had full notice of the change of 1898 and of the manner in which transfers were being made and of the fact that the company had ceased the solicitation of members on the mortuary assessment plan, nearly two years before this suit was instituted.

Trubey was present at the annual meeting of August 5, 1901, at which the company resolved to qualify as an "old line" company (Rec. p. 363). The records of the company show that he did not vote against the reorganization. That the only member who voted against it was the holder of a $4,000.00 of insurance (Trubey held $6,000.00) (Rec. p. 365), and the dissenting member was A. F. Foster of Litchfield, Minn. (Rec. p. 376). In other words the company's records show that *if Mr. Trubey voted at all he voted in favor of the reorganization.* As the total number of votes present was not cast on this resolution, so far as the records show, it would be impossible to tell whether Mr. Trubey voted at all on the question. But Mr. Trubey settles that question by saying that he did vote and voted against the resolution. Conceding then that his statement that

he voted is correct, there is a square conflict between his statement that he voted against the resolution, and the records of the meeting which show that he did not vote against it. Mr. Trubey's testimony is in very peculiar shape on this point. When his testimony was first taken by complainants he very carefully refrained from mentioning the fact that he had been present at this meeting (Rec. p. 231-254). After the record of the meeting showing his presence, and the fact that he did not vote against the reorganization, was introduced by defendants (Rec. p. 363), his testimony was again taken by complainants (Rec. p. 263). He then testified, in response to questions by his counsel, that he was present at the meeting, and as follows (Rec. p. 274-5):

"Q. * * *You may state how you voted at that time.

A. I voted against it and know of others who did also.

Q. Did you vote on every proposition there?

A. I voted in every proposition with reference to reorganization, and I also voted against every proposition with reference to the reorganization, and also the acceptance of the Secretary's report."

There was only one resolution for reorganization presented (Rec. p. 363). After this testimony was completed and the examination was closed, and the solicitor for defendants had returned to St. Paul, Mr. Trubey awoke to the fact that he had admitted voting on the question of reorganization, and that it was his unsupported statement against the records of the company, made at the time, as to whether he voted against or for the reorganization. He there-

fore, after his testimony was transcribed, made radical additions and changes to it (See Certificate of Notary, Rec. p. 274-5). He interlined the statement that *he did not remain until the meeting ended*, and that he voted upon the resolution, *if it was voted upon while he was there*. The Notary certifies that these statements were not made by the witness at the hearing. It is no doubt proper for a witness whose deposition has been taken, to request and make corrections in the stenographer's transcript to make it conform to what he actually said at the examination. But it is certainly improper after the examination has closed and the attorneys departed, and the opportunity for cross-examination gone, to make alterations so as to essentially change the statements made at the hearing. Mr. Trubey no doubt thought we would not discover these alterations or have any method of disclosing them to the Court. He was mistaken, for we succeeded in obtaining an additional certificate from the notary showing what his real testimony was.

Mr. Trubey's membership lapsed on September 30, 1901, for failure to pay the September annual dues. This was a fixed charge (not assessment) unvarying in amount, and by the terms of the articles and by-laws in force since the organization of the company, was payable on or before the last secular day in September of each year *without demand therefor* (Exhibit "C", Art. XIII, p. 305. Sec. 3, Rec. p. 319). The company had moreover sent him notice (Rec. p. 416 8-9, Exhibit 45, Rec. p. 466).

On October 10, 1901, Mr. Trubey called at the

office of the company in St. Paul and applied for reinstatement (Rec. p. 378-9). Reinstatement was not a matter of right, but was discretionary with the company on satisfactory proof of health (Art. VIII, Rec. p. 303, 318). Mr. Trubey signed a health certificate and paid up his back dues and was reinstated. The health certificate recites that his membership had terminated, and that he applied for reinstatement and warrants his present good health (Exhibit 43, Rec. p. 242, 464). There is another conflict in the testimony as to what took place at this interview. Mr. Palmer, the president of the company says (Rec. p. 378-9-80, 419-420) that Trubey stated he knew his annual dues were due in September, and that he had failed to pay them because he had heard "rumors" about the bad condition of the company, but that he was satisfied that everything was all right and approved the reorganization and wanted to reinstate. Mr. Trubey denies this (Rec. p. 261, 239). Certain facts are undisputed however. The forces behind this litigation will be considered hereafter. It is only necessary to state at this time that Mr. Trubey was taking an active part in it. His office in Chicago was in the Masonic Temple Building in the room adjoining that of Dillon & Goetz, solicitors for complainants (Rec. p. 240, 674). He was in constant conference with Edmund D. Carter and Messrs. Dillon & Goetz relating to this litigation (Rec. p. 674-7). It was he who first got in touch with Carter and turned him over to Dillon & Goetz (Rec. p. 597). The evidence is conclusive that Trubey was one of the prime movers

in this litigation. The suit had been contemplated for months (Rec. p. 672). He saw a copy of the bill in Dillon & Goetz' office before he went to St. Paul (Rec. p. 241). Before the interview with Mr. Palmer, at which he was reinstated and on the same day, October 10, 1901, he had a conference with Mr. Byers, the local counsel for complainants at Minneapolis (Rec. p. 241, 264). Mr. Byers had the bill in his possession and its contents were discussed (Rec. p. 241, 672). After the consultation with Mr. Byers Trubey immediately went to St. Paul and applied for reinstatement on October 10. He says he knew the bill was to be filed in a day or so (Rec. p. 254). He *admits he never mentioned this proposed suit to Mr. Palmer* (Rec. p. 242). *The bill of complaint was filed October* 10, *and the subpoena served on the defendants on October* 11, (Rec. p. 48-9). Trubey afterwards made a desperate effort to keep J. C. Iverson from withdrawing, and made a trip to Milwaukee for that purpose, and after failure in his efforts became a party plaintiff in order, as he admits, to prevent the suit going by default (Rec. p. 246, 598).

III.

The History of this Litigation.

The lower Court found in substance that this suit is an iniquitous attempt to wreck this company. That the prime mover in it is a "dishonest rascal" named Edmund D. Carter, who interested others with him in an effort to "line his own pockets."

While the language of the Court was severe it fell short of what the evidence justified.

The record shows conclusively that this suit is the culmination of a conspiracy of several years standing to destroy this company. The originator of the scheme, and the man who instigated and worked up the present suit, and has worked hand in glove with the complainants and their attorneys in prosecuting it, is this man Carter, late of Milwaukee, now of Chicago, an insurance solicitor when he is not engaged in some such scheme as the present, and a "common blackmailer," as Mr. Iverson called him (Rec. p. 600). The testimony *proving* this conspiracy is necessarily of considerable length, and no attempt will be made to give the Court more than a bare outline.

The general plan of operations has been to stir up dissatisfaction among the members, to convince them that the company was being fraudulently mismanaged, to discredit the company in the public mind by making sensational attacks and charges of dishonesty, with the idea of having the matter widely published; to thus prevent the company from getting business and cripple it; and then when the assaults had their effect, to commence a sensational suit for a receiver, stampede the members, wreck the company and get a large amount of receiver's and attorney's fees. The alternative of having the company buy them off has always been a prominent consideration.

Carter first appeared on the scene in Milwaukee in 1896. He called on John F. Burke, an attorney

of that city, and a member of the company, and stated that the company's affairs were being grossly mismanaged (Rec. p. 602).

The first attack which Carter made was in June, 1897, when in behalf of Alois G. Bodden, a member whom he had then been working on, he presented a complaint to the Insurance Commissioner of the State of Wisconsin, charging the company with fraud, in order to have its license revoked (Rec. p. 528-33). The complaint was dismissed by the Commissioner (Rec. p. 540).

Carter continued his work among the members in Milwaukee, and printed and published a pamphlet in which he charged the officers and trustees of the company with fraud (Rec. p. 690). A subsequent edition of this pamphlet called "The Bankers Life Brought Down to Date," Carter threatened to publish unless the company would pay him $25,000.00 in consideration of which he would "let up on the Bankers Life and go to Mexico" (Rec. p. 606 7); and later with the assistance of certain attorneys in that city whom he interested, he succeeded in procuring an indictment against the trustees and officers for fraudulent use of mails, which Carter and his associates prevailed upon the United States grand jury at Milwaukee to return in April, 1899 (Rec. p. 604-5-6). Carter was the principal witness. The indictment was immediately quashed by Judge Seaman. This indictment was widely mentioned in the press of the country, as it was intended to be. The company immediately engaged an experienced insurance detective named Edward P. Kenyon, who was

at that time in the employ of a well known detective agency (Rec. p. 682). Kenyon was placed on this case about May 1st, 1899, to find the motive of this attack and the parties behind it. His testimony should all be read (Rec. p. 682-713). He went to Milwaukee, got in touch with Carter and ascertained that a conspiracy existed, in which Carter was taking the leading part, to extort money from the company, or wreck it; that this indictment had been obtained by the conspirators with the idea of following it up by proceedings for the appointment of a receiver. Kenyon made daily written reports which he used to refresh his memory when his testimony was taken. Carter had prepared the indictment and expected to get a "good big piece of money" for "busting up the Bankers Life" (Rec. p. 687). Carter's plan at that time was "to bring about the dissolution of the Bankers Life, or if they wanted to make a settlement with him at any time, he discontinuing his work of pursuing them in the manner he was, he would consider it" (Rec. p. 690, 691).

The first indictment having been quashed, Carter prepared a second proposed indictment (Rec. p. 706; Exhibit 9, p. 724; Exhibit 18, p. 735-707).

Kenyon and Carter became very friendly and Carter prepared and signed a contract, (Rec. p. 697-8-709; Exhibit 16, p. 734), in which it was agreed that Kenyon was to have 10 per cent of all moneys received by Carter in accomplishing the dissolution of the company not exceeding $5,000.00 (Exhibit 11, p. 731). In June, 1899, Carter came to St.

Paul bringing Kenyon with him, with the double purpose of either obtaining blackmail from the company or getting some Minneapolis attorney to commence proceedings for a receiver (Rec. p. 700-1). Carter had not the courage to make a proposition to the company, but tried to get Kenyon to do it. He wanted the company to give him an annuity of $2,000.00 or a lump sum of $50,000.00 on condition that he would leave the country (Rec. p. 702-3-4). The company made no offer, and the trip was a failure. Carter's next idea was to sell the company the evidence he had against his co-conspirators (Rec. p. 704-5; Exhibit 17, p. 734-5), the price to include "the absence of E. D. C., conspirator in chief, permanently from the shores of America."

In June, 1900, Carter attempted to call indignation meetings of the policy holders in Milwaukee (Rec. p. 603-4, 546-7, 554-9, 601) to raise funds to start a suit. In November, 1900 Carter again called on Burke, the company's attorney at Milwaukee, to blackmail the company. He prepared a revised edition of his pamphlet called "The Bankers Life Brought Down to Date," and threatened to publish it. He offered to leave the country and "let up" on the company for $25,000.00 to be deposited to his credit in Mexico (Rec. p. 606 7). In the spring or summer of 1901 Carter went to Chicago and Messrs. Trubey and Dillon & Goetz joined with him in his enterprise. Trubey is engaged in the business of handling personal injury claims with an office at Room 1598, Masonic Temple, Chicago, (Rec. p. 240). Dillon & Goetz are next door, room 1510. Carter

first laid his plan before Trubey, who placed Carter and his case in the hands of Messrs. Dillon & Goetz (Rec. p. 596-7-8, 243). Carter was established in the office of Dillon & Goetz and went to work on the case. He supplied the alleged information on which this suit was based (Rec. p. 245-6). Carter, Trubey, and Dillon & Goetz were in constant conference about the case (Rec. p. 243-4, 674-7). The first step was the preparation of the bill of complaint. Carter assisted in the preparation of this proposed bill, and the written portions of it were in his handwriting (Rec. p. 542-3). The next step was to procure some member of the company in good standing to act as complainant and sign the bill. Mr. Trubey says he refused to appear as complainant at that time. Under the circumstances his reasons for desiring some other member to appear in this capacity are readily understood. It became necessary therefore to interview members and induce some one to act as plaintiff. This work was principally done by Carter and Mr. Goetz. When a member called at Dillon & Goetz' office he was referred to Mr. Carter for information about the case (Rec. p. 655). They personally interviewed members in Chicago and Milwaukee, represented that the company was being fraudulently mismanaged, and endeavored to induce members to permit the use of their names as parties plaintiff (See testimony of Geilfuss, Rec. p. 541-6, 553), Kuenzli (Rec. p. 548-550, 348), Oberndorf (Rec. p. 612-615, 343), Knell (Rec. p. 525), Pank (Rec. p. 617-9), Anderson (Rec. p. 653-6), Iverson (Rec. p. 590-2). Mr. Iverson was induced

to sign the bill (Rec. p. 595-6). On learning the real nature of the case he afterwards withdrew (Rec. p. 599-600).

It has heretofore been stated that Trubey had permitted his membership to lapse, but proceeded to Minneapolis and after an interview with Mr. Byers, on the subject of the case, came to the home office of the company and obtained reinstatement without mentioning the proposed suit, undoubtedly in order to place himself in a better position to appear as a plaintiff, if necessary (See statement of facts on Mr. Trubey's connection with the company). The very same day, October 10, 1901, the bill of complaint was filed. It is just such an incoherent document as one would expect Carter to prepare, judging from his former literary efforts shown in the record, and is replete with charges of gross dishonesty on the part of the officers, and of "utter and hopeless insolvency," intended to discredit the company and stampede the members. These charges were utterly groundless as the Court found; in fact no sincere effort was made to sustain them.

In the meanwhile Carter was working industriously in the office of Dillon & Goetz. Within four days after the bill was filed a tremendous amount of literature addressed to members was mailed from the office of Dillon & Goetz, addressed in the handwriting of Edmund D. Carter. Samples of this literature were produced by the witnesses Rennick (Rec. p. 620-621; Defendants' Exhibits 1 and 2, p. 717-8), Miller (Rec. p. 623-4; Defendants' Exhibits 3, 4 and 5, Rec. p. 718-9), Woodward (Rec. p. 627-8; Ex-

hibits 6 and 7, Rec. p. 719-20), Maher (Rec. p. 713-4; Defendants' Exhibits 13, 14 and 15, Rec. p. 732-3), Scanlon (Rec. p. 516-7-8; Exhibits 23, 24 and 25, Rec. p. 518-19), Knell (Rec. p. 523-4-5), Iverson (Rec. p. 592-5).

The handwriting of Carter is identified by the witnesses Kenyon and Burke. The identity of the circulars is further established by the testimony of Mr. Palmer (Rec. p. 419-421). This literature consisted of circular letters purporting to come from Iverson and Wright addressed to members of the company, stating that "*at the instigation and request of a great many policy holders* we have brought suit in the U. S. Circuit Court against the above named company" for the appointment of a receiver on the ground of "gross and fraudulent" mismanagement, and requesting the members to employ "our attorneys Dillon & Goetz, and our counsel John F. Byers" to make them parties to the suit. Enclosed with this circular was a blank power of attorney for the employment of Messrs. Dillon & Goetz and John F. Byers. As apparently these circulars did not meet with the response expected, the later ones had the following endorsement on the blank power of attorney: "Costs, expenses and attorneys' fees to be paid out of proceeds pro rata by order of Court, otherwise you are only to be liable for your share of costs and expenses not to exceed $3.00 (Rec. p. 519). Iverson says he did not know of this letter until after it was issued (Rec. p. 592). The statement that the suit had been begun at the *instigation* and *request* of a *large number* of policy holders was abso-

lutely false. Iverson says no one ever requested him to commence the suit except Carter and Goetz (Rec. p. 595). Wright was unable to name a single member who had ever requested him to institute a suit (Rec. p. 586-7). He admitted that the circular was sent out to make the company "disgorge" (Rec. p. 584). Carter and Dillon & Goetz were all put upon the stand and given an opportunity to tell who these "*great many members*" were. They refused to testify, claiming that the information was "privileged" (Rec. p. 629 et seq, 646 et seq, 650 et seq). The record is convincing that at the time this circular was sent out the only member they had whose policy had not lapsed long before, was J. C. Iverson. Trubey admitted that he made an earnest effort to prevent Iverson from withdrawing, and that when Iverson's name was withdrawn Trubey himself had to become a party to prevent the suit going by default (Rec. p. 596-600, 246, 678).

Let us see what was the fruit of these circular letters sent out by the hundreds. Three months after they had been issued complainants made a motion to make additional parties plaintiffs (Rec. p. 335-341). They presented a list of some thirty-five names, whom they alleged were "members." On the hearing it developed that there were only five on the list whose policies were in force. The rest were all lapsed members (Rec. p. 344-5-6). all but one of whom had lapsed prior to the reorganization of the company, and some as far back as 1898. Of the five members whose policies were still in force, one filed an affidavit that he had never authorized the use

of his name (Rec. p. 342), two others filed affidavits that they had been induced by Dillon & Goetz, or their agents, to join in the suit, by representations that the officers of the company were guilty of fraud and dishonesty, and they desired to have their names withdrawn, as they had been misled (Rec. p. 343, 348), and one more filed a petition to withdraw (Rec. p. 347). The motion was denied, on the technical ground that the motion papers did not contain proposed amendments to the bill connecting these individuals with the case, and the application was never renewed.

The last effort of the plaintiffs to stampede the members took place in March, 1902. The regular annual meeting of the members took place on March 4, 1902, as provided in the new articles. On March 1st, 1902 (Rec. p. 98-9) just prior to this meeting, complainants filed notice of motion for the appointment of a receiver *pendente lite*, on the ground of the insolvency of the company to be heard March 10th, after the meeting. The purpose was obvious, but the attempt failed, and the motion for a receiver *pendente lite* was so frivolous that the Court denied it without hearing defendant.

Only one other fact need be mentioned. Mr. Trubey testified that so far as he knew Carter had no financial interest in this case. We are asked to believe that this man, who for years had been pushing a blackmailing scheme against this company, and endeavoring to extort money and to make contracts with attorneys and others for the dissolution of this company, by which he was to get a large share of the

receiver's and attorney's fees, and who established himself in the office of Dillon & Goetz, and has done the lion's share of the work in this case, is not financially interested in it. We need only call the Court's attention to the testimony of Mr. Anderson (Rec. p. 653-665). He was an old gentleman, a member of the company, who was very much concerned at the possibility of having the company wound up and his insurance lost (Rec. p. 660). Some time after the suit was instituted he called at Dillon & Goetz' office, upon his own responsibility, and without any authority from the company, to find out what it would take to settle the case. He had some talk with Mr. Dillon, who referred him to Mr. Carter. Mr. Anderson testified as follows:

"He (Mr. Dillon) said 'Now you had better talk to Mr. Carter about this, and *see what you can do with him and what he says about it*,' and then I went out—Mr. Carter, had a little desk in the outside office, and I went out and had a long talk with Mr. Carter on the same line," etc.

And Carter told him "You had better see what you can do with the company, what you can get from the company, before you come to us." In short, if any settlement was to be made of this suit Mr. Carter was the man the company must deal with.

ARGUMENT.

I.

Although it is alleged in the bill that this suit was instituted by the complainants for the benefit of themselves and all other persons similarly situated, no relief can be granted unless appellants show themselves entitled to it.

In the case of Hubbell v. Warren, 8 Allen 173, a bill in equity was brought by plaintiff in behalf of himself and such others having an alleged right in common with him as should come in to prosecute the suit, to restrain defendant from constructing a building less than twelve feet from a street, the Court said:

> "This bill is brought by the plaintiff for the benefit of himself and of all other persons whose estates are similarly situated with his own on the same street and are entitled, as he alleges, to the same right or privilege as that which he sets up as belonging to the premises which are owned and occupied by himself. But as no other person has actually come in to prosecute the suit jointly with the plaintiff, it stands like a creditor's bill, and he is to be regarded as *dominus litis*. As the case is now presented the bill cannot be maintained unless satisfactory evidence is offered of a right in him to equitable relief."

Wright and Trubey were the only parties plaintiff in the Court below, and are of course the only parties whose rights are before this Court. No relief

can be granted in this case unless they personally are entitled to it. They cannot obtain a decree for the benefit of members who have never applied for it, and presumably do not desire it. This principle is important as a number of the points urged by defendants are personal to these two appellants.

II.

It is an elementary principle that a member of a mutual Company is bound by the articles and by-laws in operation at the time he becomes a member. He cannot question their validity.

Pfister v. Gerwig, 122 Indiana 567.

It will therefore be unnecessary to consider any of the articles or by-laws, or transactions of the Company, prior to the time the appellants became members. In determining what was the contract between the appellants and the Company, and what was the character and purpose of the Company, and whether there has been any violation of the contract or fundamental departure from the purpose of the corporation, nothing prior to December 10, 1892, the date of Wright's membership, is material.

III.

The action of the defendant company, through its trustees, in adopting about January 1, 1899, amended articles and by-laws and in issuing thereunder the so-called Guaranteed Option policies, and in transferring members and ceasing to solicit members on

the mortuary assessment certificate plan was not a fundamental departure from the original purposes of the corporation, nor *ultra vires* nor a breach of appellants' contract.

Considered in natural and chronological order, the first points urged by appellants are contained in the 2nd assignment of error. The acts therein referred to took place during what has been already described as the Second Period of the Company's history. As it can hardly be claimed that the issuance of the guaranteed option policies and the transfer of members were not authorized by the terms of the amended articles and by-laws of December 21, 1898, the real question is whether those articles and by-laws were valid.

The defendants' position on these propositions is as follows:

1st. The Minnesota Statute (Chap. 184 Laws of 1885) under which the Company was organized and operating, authorized the operation thereunder of any kind of assessment Company.

2nd. The articles under which appellants became members expressly empowered the trustees to make amendments therein and change the company's plan of action.

3rd. The amended articles of 1898 did not change the character of the Company as an assessment Company, nor alter the terms of existing contracts, but merely provided for the issuance of new forms of as-

sessment policies and were within the powers vested in the Board of Trustees, and the Guaranteed Option Policy was in fact an assessment policy.

1. The legislative act under which the Company was operating (Chap. 184 Laws 1885), authorized any form of cooperative or assessment company. Section one of the act states generally that cooperative or assessment companies may be organized thereunder. The definition of cooperative or assessment companies contained in Section 5 is of the most general nature, and is broad enough to include all companies of that character.

By Section 2 the particular mode and manner of doing business is left entirely to the members of the corporation.

Section 7 of the act, providing for annual statements, shows (paragraphs nineteen and twenty) that the legislature intended that companies operating under this act should not be restricted to collecting from the members merely sufficient to pay current expenses and death losses, but might collect assessments in advance and accumulate a reserve fund. Section 19 expressly provides that nothing in the act shall be construed to prevent the creation of a reserve fund by such corporation.

Section 7 (paragraphs 21st, 22nd, 23rd, and 28th) expressly recognizes the right of such company to issue different forms of contracts and to divide its business into classes. There can be no doubt that this law, authorized every kind of cooperative and assessment company. A company might collect its

assessments at such times and in such amounts as it saw fit, and it might accumulate a reserve, divide its business into classes, and issue various forms of contracts. The only essential requirement was the one implied in the case of all assessment or cooperative companies, that either the amount of assessments or the amount of payments to beneficiaries should not be limited to a fixed sum.

2. In the articles of 1892 in force when appellants became members, the members had adopted a particular method or mode of doing business. But it was anticipated that the particular method adopted might prove impractical or unsatisfactory, and that changes in the method might have to be made in the future. Therefore it was expressly provided that the Board of Trustees might amend the articles in any particular except as to Article X, regulating the use of the Guaranty Trust Fund. The reason for delegating this power to the trustees was the well known difficulty of getting the scattered members of a life insurance company to take part in its meetings.

A power of amendment contained in the charter of a corporation or in the laws under which it is organized, is a part of the contract with the members and stockholders.

Nugent v. The Supervisors, 19 Wall. 241, 249.

Sparrow v. The Evansville etc. R. R. Co., 7 Ind. 369, 373.

Witter v. The Mississippi Etc. Ry. Co., 20 Ark. 463.

Fry's Executor v. Lexington etc. R. Co., 2 Metcalfe 314, 317.

The only question in such cases is as to the limit of the power. It has sometimes been held that under a general power of amendment no fundamental change in the character of the corporation can be made,and that such a power of amendment does not authorize a change in the express terms of outstanding contracts with members of a mutual insurance company. No such changes were made in this case. What is a fundamental change will be considered hereafter in connection with later acts of the company. It is unnecessary to discuss it here. It will be plain that the amendments of 1898 did not work a fundamental change in the character of the corporation, and that no attempt was made to alter the terms of existing contracts. Whatever the limits of such a power may be, the Board of Trustees could at least under this power change the company's method as to new busness, and provide for the issuance of new forms of policies, and make other changes in the internal management of the company. The existence of this power of amendment plainly indicates that the necessity for such changes was contemplated. Instead of there being any implied agreement in the articles that the company should always continue to issue contracts on the exact plan originally adopted, there is *an express agreement that this plan might be modified.* The power to change the company's method and to issue different forms of contracts to new members necessarily implies the

power to divide the members into classes. The very act of issuing contracts to new members, differing in terms from the existing contracts, would necessarily create new classes.

3. It only remains to determine the character and extent of the amendments of 1898.

a. The character of the company as an assessment company was unchanged. The amended articles and by-laws expressly provided that the company should transact business upon the assessment plan (Rec. p. 308), and that the members' liability to contribute to the payment of death losses should not be limited to a fixed sum, and by the terms of the policies issued this liability was unlimited.

The Guaranteed Option Policies contained provisions that all payments by the insured should be voluntary, and this together with the "safety clause" made these policies pure assessment contracts. The terms of the safety clause differed somewhat in different policies. In some cases the policy provided that if the company was unable to maintain sufficient funds to mature the policies the insured might be called on to pay his share of the deficiency, or the amount thereof might be declared a lien on the policy and be paid out of the proceeds on the death of the insured. Other policies contained merely the provision that the amount of the deficiency should be an indebtedness in the form of a lien on the policy until paid off by dividends or otherwise. These provisions amount to substan-

tially the same thing. In one case the insured might be called on at once to pay the deficiency. In the other, the deficiency might not be paid until the member's death, and then out of the amount due the beneficiary. There is no essential difference in the character of these contracts. They are on the assessment plan, and have been in general use by assessment companies who have gone through a transition, like that through which this company has passed.

Haydel v. Mutual R. F. L. Ass'n, 44 C. C. A. 169; 104 Fed. R 718, S. C. 98 Fed. R. 200.

Rundel v. Kennan, 79 Wis. 492

Elliott v. Des Moines Life, 163 Mo. 132.

Williams v. St. Louis Life Insurance Co., 97 Mo. App. 449.

b. The express obligations of existing contracts were not in the least affected by these amendments. On the contrary, nothing in the amended articles and by-laws tended in the least degree to alter the terms of existing contracts. All provisions of the original articles for the carrying out of these contracts on the part of both members and company were continued in force. The amendments only related to future contracts.

c. Under the amended articles and by-laws the company still had the power to continue the issuance of mortuary assessment certificates on the old plan, in addition to the power to issue new forms of policy. The appellants complain of the fact that the

company ceased the solicitation of new members on the old plan. The reasons for this action are fully set forth in the statement of facts. The officers could not have written sufficient business on this plan to keep the company a going concern, if they had desired it. The amount of business written had fallen from $12,000,000 in 1892 to $2,000,000 in 1898 (Rec. p. 382), and the officers were unable to write enough business on this plan to equal the amount of lapses. This was not the fault of the company or its officers, but was due to adverse legislation and the unpopularity of such insurance with the public. The cessation of attempts to write this business was a matter of sound business judgment and was a matter wholly within the control of the board of trustees, in whom was vested the general management of the Company. We fail to see how any contract was broken by these acts. There was no implied contract with the members that the Company should always continue to write new business on the plan originally adopted. On the contrary, the power of amendment given to the trustees expressly authorized changes in that plan under which all new business might be written. The power was broad enough to authorize an amendment expressly providing that all new business should be written on a modified plan, and that the issuance of certificates on the old plan should be discontinued. If a life insurance company has power to issue various forms of policy, we know of no rule of law which would prevent its officers from devoting their efforts to the solicitation of business with that particular form of contract

which is most favorable to the Company's interests, and on which members can be most easily obtained.

d. The appellants also complain of the acts of the officers in transferring members. If such a provision had not been made, the members of the mortuary assessment plan would have been the first to complain that they had been left behind in a moribund class.

As it was expressly agreed that the articles might be amended so that all new business should be written on a different plan, it was fairly implied that the Company might permit the existing members who desired to do so, to surrender their old contracts and accept the new forms, and if the interests of the Company and the members themselves required it (as the evidence clearly shows) to solicit such transfers.

There certainly was no express agreement in the appellants' contracts that the Company should not permit or solicit members holding similar contracts, to surrender them and accept in lieu thereof other and safer forms of contracts which might be afterwards adopted. Nor can we see how any such obligation can be implied. The contributions of the members were always voluntary, the only penalty for nonpayment being forfeiture. There was nothing to prevent any member from allowing his old mortuary assessment certificate to lapse and then applying for and receiving one of the new forms of policy.

Nor is there any evidence in this case tending to

show that any member was *in fact* injured by such transfers, or the security of any of their contracts impaired. The contrary appears. It is not desirable to restate at length the evidence on this question. The lower court found that the changes made and transfers had not in fact impaired the value of any contract, but were for the best interests of all the members, and carried out with perfect fairness and equity. Briefly summarized the evidence shows:

1st. That if the Company had not made the changes that it did, and transferred the members, the existing contracts would have been greatly impaired in value, if not worthless in a very few years.

2nd. That the transfer of the members has placed the company on a stable and permanent basis, and in a better position to carry out all its obligations.

3rd. That the increase in average age and in the rates of assessment among the remaining holders of the mortuary assessment certificates has not been caused by these transfers but is the inevitable result of other causes already in operation before these transfers commenced, and would undoubtedly have been more aggravated if the transfers had not been made.

4th. That the assessment rates on the members of the mortuary assessment certificates are not unreasonable in amount, and have always been less

than the contracts permitted, and have in fact been less than the cost of the insurance, as determined by scientific principles.

5th. That instead of having impaired its ability to carry out the terms of the mortuary assessment contracts, the company is better able to perform its obligations than it would have been if these transfers and changes had not been made.

The conclusions reached on this branch of the case covering the amendments of 1898, and the tranactions of the company during the Second Period, are

1. That the company under its amended articles was of a character and with powers authorized by the legislative act under which it was organized and operating, and hence the company had legislative consent to the exercise of the powers provided for in the amended articles and by-laws.

2. That the change of plan inaugurated in 1898 was not a fundamental change in the nature of the corporation, but a mere alteration in the manner of transacting its business.

3. The power of amendment contained in the original articles, and which formed part of the contract of every member, authorized the changes which were made, and hence the company had the consent of the members, given in advance, to the exercise of the powers contained in the amended articles and by-laws.

4. It follows that the acts in question were not

ultra vires, either in the sense of being outside the powers granted by the legislature, or in the sense of being beyond the powers agreed to between the members, nor was there a breach of the express or implied obligations of any contract.

As was said in Nugent v. The Supervisors, (P. 251) supra, a subsequent alteration of the organization or purposes of a corporation violates the member's contract, "only when such alteration is both fundamental and not provided for *or contemplated* by either the charter itself or the general laws of the State." In the present case the changes were not fundamental and were contemplated and provided for in the original articles.

IV.

The appellants are estopped by their *laches* to assert the claim that the changes of 1898, and the issuance of the guaranteed option policies and the transfers of members and the internal management of the company during this period in any way violated the terms of their contracts.

The appellant Trubey was informed of the character of the new policy, the fact that members were being transferred, and that the Company proposed to solicit no further business on the old plan, in the latter part of 1899. Similar knowledge was imparted to Wright at about the same time. They were fully informed of the details of the plan. This bill was filed on October 10th, 1901. Between the date that the appellants had notice of the facts and

the commencement of the suit, two years elapsed, during which neither of the appellants took any steps to assert their present claim, by legal proceedings or otherwise. Between December 31, 1899, and July 31, 1901, over $7,000,000 of insurance was transferred by the surrender of the mortuary assessment certificates and the issuance in lieu thereof of the Guaranteed Option Policies, and new policies to a considerable amount issued to new members. The company has gone so far with its new plan, that at the time this suit was commenced it would have been impossible to retrace its steps. It would be grossly inequitable to wind up this Company and wipe out millions of insurance issued and accepted in good faith, at the request of two members who with full knowledge of the facts stood by for two years while the Company's plan was being consummated, and took no steps to prevent it, or assert their objections.

Penn. Mut. Life Co. v. Austin 168 U. S. 685.

Dimpfell v. Ohio & Miss. R. Co., 110 U. S. 209.

Pomeroy in his work on equity, Vol. 2, Section 818, says:

> "Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class in equity rest upon the principle 'if one maintain silence when in conscience he

ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.' "

And in Section 819:

"This species of estoppel as well as other kinds which consist of affirmative acts or representations, applies to corporations in their dealings with third persons and with their own stockholders. * * * Conversely, stockholders may be estopped by their acquiescence from objecting to the acts of the corporation which are not illegal or *mala prohibita*, but *ultra vires* when the rights of innocent third parties have intervened. Express assent is not necessary to estop the stockholders; when they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of its being done, they will be deemed to have acquiesced and will be estopped as against innocent third persons."

The application of this principle is well illustrated in the case of Kent v. Quicksilver Mining Co., 78 N. Y. 159. In that case the defendant corporation had issued a large amount of stock, all common and on the same basis, without any provision for preferred. Afterwards at an annual meeting a majority of the stockholders voted that holders of stock who should surrender their certificates and pay five dollars on each share should be entitled to the same number of shares of preferred stock, which should bear interest at 7 per cent and the balance of the net earnings should be divided *pro rata* between the holders of the preferred and common stock. A large

amount of this preferred stock was issued and placed on the market and listed in the stock exchange, and for four years the two kinds of stock were mentioned in annual reports of directors. During this time no stockholder took any steps to attack the validity of the preferred stock. In an action subsequently brought by holders of the common stock for that purpose it was held:

> "That such holders were chargeable with notice of the issuance of the preferred stock, and that by acquiescing in the action of the corporation they had ratified and assented thereto, and the same was binding upon them at least as against those holders of the preferred stock who had purchased it after it had been upon the market and dealt in it as a valid and recognized issue; also that as the prayer for relief was that all of the preferred stock should be called in and cancelled, and as it was not practicable to adjudge that a portion of the shares of the preferred stock should be called in and cancelled or equalized with the common stock, without all being so treated, there was no cause of action."

The appellants claim that the amendments of 1898 and the acts of the company in transferring members and issuing the Guaranteed Option Policies were *ultra vires* of the company. In just what sense they use the term *ultra vires* is not stated, but clearly, if these acts were *ultra vires* in any sense, it is not because legislative consent was wanting, but the consent of the members. Assuming that they were *ultra vires* in this limited sense, the principle of estoppel applies to this case. We

are aware that in a number of cases this Court has laid down the rule that the principle of estoppel cannot be invoked to make valid an act of a corporation beyond the scope of its powers.

Thomas v. R. R. Co., 101 U. S. 71.

Oregon Ry. Co. v. Oregonian Ry. 130 U. S. 1.

Central Transp. Co. v. Pullman Car Co., 139 U. S. 24, 59.

Louisville &c. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 570.

The underlying principle in these cases, is stated by the Court in the Central Transportation Co case, (p. 59) as follows:

> "A contract of a corporation, which is *ultra vires* in the proper sense, that is outside of the object of its creation as defined in the law of its organization, and therefore *beyond the powers conferred upon it by the legislature*, is not voidable only, but wholly void and of no legal effect." * * * "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or action because such prerequisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contest can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

The rule in these cases has no application to the case at bar. In all the cases above cited the particular transactions involved were *ultra vires* in the sense that they were beyond the scope of the powers conferred by the legislature and in the sense that *the legislative consent was wanting.* In such a case the corporation could not acquire the power even by the unanimous consent of its members. The exercise of such a power is void and could not be ratified, and it would be against public policy to apply the principle of estoppel. The present case is radically different. If the transactions during the period under consideration were *ultra vires* of the company, they were so merely in the sense that the unanimous consent thereto of the members was necessary and was wanting. Legislative consent was not wanting. The general laws under which the company was organized and operating plainly authorized the exercise of the powers which the company in fact exercised. All that was necessary in order that the powers exercised should be possessed by the company was the consent of the members to the acceptance by the corporation of the powers tendered to it by this general law, and if such consent was all that was needed, the members may clearly be estopped by their conduct to deny that the necessary consent was given.

In the case of Kent v. Quicksilver Mining Co., 78 N. Y. 159, 185, supra, it is said:

> "In the application of the doctrine of *ultra vires*, it is to be borne in mind that it has two

> phases; one where the public is concerned; one where the question is between the corporate body and the stockholders in it, or between it and its stockholders and third persons dealing with it and through it with them. When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent or his intelligent though tacit consent to the corporate action."

It can make no difference in the application of these principles whether the corporation is organized under a legislative charter, or under a charter framed by the corporation under general law. If under a legislative charter, the special act creating the corporation necessarily defines its powers, and the corporation cannot exercise any powers not therein conferred. In the case of a corporation organized under a general act, the members may not insert in the articles of association nor exercise any powers not tendered in the general law. If they in fact insert in their articles or attempt to exercise a power not tendered by the general law, such acts are void, and under the rules laid down by this Court, no principle of estoppel can be invoked to make such acts effective, for the reason that legislative assent is wanting. But where, as in the case

at bar, the corporation is organized under a general law, which tenders to the corporation all powers which it in fact assumed to accept and exercise, and the only thing needful to vest the corporation with the powers in question is the consent of the members, the members may be estopped by their conduct to deny that this assent was given.

It should also be noted that the failure of the Company to solicit or write new business on the mortuary assessment plan, was not an *ultra vires act.* It was merely an ommission to exercise an admitted power; an omission induced by the best business reasons and acquiesced in by the appellants for two years or more.

V.

At this point in the case appellant Trubey becomes the only party plaintiff whose rights require further consideration. Wright is not in a position to question any acts of the company subsequent to October, 1899, or at least January 3, 1900. On learning of the changes inaugurated by the company in December, 1898, he directed the company in October, 1899, to cancel his membership certificate and stated he would look elsewhere for his insurance. He failed to pay the December, 1899, mortuary assessment, due January 3, 1900, and since October, 1899, has not exercised any of the rights nor fulfilled any of the obligations of membership.

a. By the weight of authority the contract between the member and the defendant corporation

was unilateral. The member had option of withdrawing at any time, the compensation of the company in such case being the forfeiture of the Guaranty Trust Fund deposit. The member's declaration of severance is usually his failure to pay an assessment, but there is no reason why it should not be a written declaration independent of any assessment.

Clark v. Schromeyer, 23 Ind. App. Ct. Rep. 565.

The direction given by Wright to cancel his certificate in October, 1899, terminated his membership under this rule. His right to interfere as a member in the affairs of this company was then ended.

b. If we are right in the position that the amendments of 1898, and the conduct of the Company's affairs thereunder did not constitute a breach of his contract, he was not justified in failing to pay subsequent assessments, and it necessarily follows that his membership lapsed January 3, 1900, if not sooner terminated by his action in directing the cancellation of his certificate. It is apparent therefore that appellant Wright must base his claim for relief in this case on transactions prior to January 3, 1900. He cannot question any subsequent transactions of the company. One whose membership in a corporation has been rightfully forfeited for non-payment of assessments has no right to interfere in the conduct of the corporation's affairs.

St. Louis & Sandoval Coal & Mining Co. v. Sandoval Coal and Mining Co., 116 Ill. 170.

c. The lower court further held (Rec. p. 744) in substance that assuming that the acts of the company prior to October, 1899, constituted a breach of Wright's contract, his voluntary action in cancelling his membership left him with no remedy, except an action at law to recover back money paid, and as his claim has not been reduced to judgment he has no standing in a court of equity under the rule in Scott v. Neely, 140 U. S. 106.

VI.

In the first assignment of error it is claimed that the act of 1901, under which the company qualified as an old line company is "unconstitutional." In the third assignment of error it is claimed without reference to the validity of the statute that the change was in fact a fundamental one, and constituted a breach of contract.

We assume, that the constitution referred to is that of the United States, and that the particular provision claimed to have been violated is the one forbidding States to pass any laws impairing the obligation of contracts. As the appellate jurisdiction of this court in a case like the present can be invoked only where a constitutional question is involved, it was necessary for the appellants to raise some such question. The particular obligation of appellants' contracts, which they apparently claim to have been violated by this statute is the implied one that no fundamental change in the character or purpose of the corporation could be made without

the unanimous consent of the members. It is not claimed that any express provision of their contracts has been violated.

Section 21 of the act in question provides that any insurance company, including those on the mortuary assessment plan, may qualify and be governed by the act, "*provided that nothing herein contained shall impair or operate to impair the obligation of any contract.*" The only reasonable construction to be given this act is that the legislature intended to authorize a reorganization under the act only in those cases where no contract obligation would be impaired, and withheld permission to reorganize in any case where such reorganization would operate to impair contract obligations. It is possible that the charters of some assessment companies may contain provisions which would make such a reorganization a breach of the member's contracts, and that the charters of other such companies may have been so framed as to expressly or impliedly authorize such a change. This the legislature had in mind and expressly withheld permission to qualify under the act in those cases where a contract obligation would be impaired thereby. On this view of the meaning of the statute it can hardly be claimed that the statute is obnoxious to any constitutional provision. We do not see how it can be claimed in good faith that a statute which authorizes a certain act upon the express condition that such act shall not impair a contract right, is in contravention of the provisions of the Federal Constitution referred to.

The constitutional question in this case relied on to support the jurisdiction of the court is therefore manifestly frivilous. This court might well refuse to assume *jurisdiction of this case on the ground that* the claim is fictitious.

Penn. Mut. Life Ins. Co. v. Austin, 168 U. S. 685, 695.

The real question in the case is whether or not the Minnesota statute authorized this particular company to accept its provisions, and that question in turn resolves itself into an inquiry as to whether or not, under the circumstances of this case, the reorganization of the defendant company operated as a breach of the members' contracts by making a fundamental change in the character of the corporation to which they never assented. If it did so operate, the attempted reorganization was unauthorized by the legislature. If it did not so operate the reorganization was authorized. This is not a constitutional question.

We do not see that this statute is susceptible of any other interpretation. Appellants may claim that the statute unconditionally authorizes such companies to change from the assessment to the legal reserve plan, on the vote of less than all the members of the corporation, and that the legislature merely intended to direct that all existing contracts of insurance should be carried out according to their terms, and that a statute which authorizes certain acts which *necessarily* operate to impair contract obligations cannot be saved from constitutional objec-

tions by a mere direction or declaration that no contract shall be impaired. This interpretation is a forced one, and disregards the plain language of the law.

But whatever view is taken as to the legislative intent, the ultimate inquiry, involved in the first and third assignments of error, is whether the reorganization of August 5th, 1901, made such a radical and fundamental change in the character and purpose of the defendant corporation as to require the unanimous consent of the members.

It has been repeatedly held that it is implied that every corporation which undertakes the accomplishment of a particular enterprise intends to make such changes in furtherance of the original purpose, as experience may show to be necessary for its successful operation, and that the majority of the members may bind the minority in this respect, *even though the changes were not originally contemplated nor provided for*, whenever the necessary legislative consent is obtained. The majority may bind the minority by accepting an alteration or amendment which does not radically or fundamentally change the character or general objects of the corporation, but is merely in furtherance of the objects for which the corporation was created, and conversely, the majority cannot bind the minority by accepting an alteration or amendment which will operate as a radical or fundamental change in the character or objects of the corporation.

This question has some times been raised in cases where suit was instituted by a member or stockhold-

er to enjoin a proposed fundamental change, but most frequently the principle has been relied on by the stockholders as a defense to an action on his contract of subscription, where it was claimed the purposes of the corporation had been altered after the subscription was made; and again most of the cases of the latter kind involve a state of facts where a railroad company has changed the proposed route of the railway after the subscription was made.

The general principle is clear enough, but the difficulty has been in its application to the facts of each case, and in these railroad cases some courts have no doubt been influenced to hold a change of route fundamental, by the well known fact that subscriptions to such an enterprise are frequently made by those who expect their own property to be enhanced in value by the construction of a railway along a particular line.

Following is a fairly complete list of the cases on this subject, material in illustrating what has been held to be a fundamental change. Changes that were held fundamental:

1 Natusch v. Irving, 2 Cooper's Chanc. Cases 358.

2 Ashton v. Burbank, 2 Dillon 435.

3 Proprietors of the Union Locks and Canals v. Towne, 1 N. H. 44.

4 Hartford & N. H. R. R. Co. v. Croswell, 5 Hill 383.

5 Middlesex Turnpike Corporation v. Locke, 8 Mass. 267.

6 Clearwater v. Meredith, 1 Wall. 25.

7 Bank v. City of Charlotte, 85 N. C. 433.

8 New Haven & Derby R. R. Co. v. Chapman, 38 Conn. 56, 71.

9 Kenosha, Rushford & Rock I. R. Co. v. Marsh, 17 Wis. 13.

10 Marietta, etc., R. R. Co. v. Elliott, 10 Ohio St. 57, 61.

11 Stevens v. Rutland & Burlington R. R. Co. 29 Vt. 545.

12 Winter v. Muscogee R. R. Co., 11 Ga. 438.

13 Alexander v. R. R. Co., 108 Ga. 151.

14 New Orleans, Jackson & G. N. Ry. Co. v. Harris, 27 Miss. 517.

15 Black v. Delaware & Raritan Canal Co., 24 N.J. Eq. 455.

16 Witter v. Mississippi, etc., Ry. Co., 20 Ark. 463.

Changes that were held to be not fundamental:

17 Zabriskie v. R. R., 23 How. 381, 396.

18 Buffalo & New York City R. R. Co. v. Dudley, 14 N. Y. 336, 348.

19 Irvin v. Turnpike Co., 2 Penrose & Watts 466.

20 Sprague v. Illinois River R. Co., 19 Ill. 173.

21 Banet v. The Alton & Sangamon R. R. Co., 13 Ill. 504, 511.

22 Everhart v. The West Chester & Philadelphia R. Co., 28 Pa. St. 339.

23 Cross v. Peach Botton R. Co., 90 Pa. St. 392.

24 Wilson v. The Wills Valley R. R. Co. 33 Ga. 466.

25 Gray v. Monongohela Nav. Co., 2 Watts & Serg. 156.

26 Miller v. Insurance Co., 92 Tenn. 167.

27 Payson v. Withers, 5 Biss. 269.

28 Picard v. Hughey, 58 Ohio St. 577.

See also

Freeman's note to Commonwealth v. Cullen, 53 Am. Dec. 450, 461.

Nugent v. The Supervisors, 19 Wall. 241, 248.

In Natusch v. Irving (1) the plaintiff had subscribed to the capital of The Alliance British & Foreign Fire & Life Insurance Co., a joint stock company, organized for the purpose of writing fire and life insurance. Subsequently, without the consent of plaintiff, the company's managers attempted to accept the provisions of an Act of Parliament authorizing the company to write marine insurance. It was held to be an entirely new enterprise not contemplated by the original agreement.

In Ashton v. Burbank (2) it was held: "The change in the charter by which a life and accident company was authorized to transact fire, marine and inland insurance, is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them."

In Proprietors of the Union Locks & Canals v. Towne (3), where the charter of a corporation which

authorized it to build a dam and purchase six acres of land to render a river navigable between specified points, and to levy enough assessments on its members for that purpose, was afterwards amended so as to authorize the enlargement of the dam and the purchase of one hundred acres, in order to improve portions of the river not included within the limits of the original improvement, such change was held fundamental.

In Hartford & N. H. R. R. Co. v. Croswell (4) the defendant subscribed to the stock of a corporation whose original charter provided for the construction of a railroad from Hartford to New Haven The Court says:

> "Since entering into this contract the plaintiffs have procured an amendment of their charter by which they have superadded to their original undertaking a new and very different enterprise, and for aught that can be known, a very hazardous one—with the necessary powers to carry it into effect. Instead of confining their operations to the construction and management of their railroad between Hartford and New Haven, they have undertaken to establish and maintain a line of water communication by means of steamboats at an expense not to exceed $200,000, to all of which it is insisted the contract of the defendant has become subject, without his approbation or assent."

The Court, by Ch. J. Nelson, after holding this to be a fundamental change in the objects of the corporation, releasing the subscription, says:

> "I do not deny that alterations may be made

in the charter by the procurement of the company without changing the contract so essentially as to absolve the subscriber. Such would be the case perhaps in respect to mere formal amendments or those which are clearly enough beneficial, or at least not prejudicial to his interests. A modification of the grant may be frequently advisable, if not necessary, in order to facilitate the execution of the very object for which the company was originally established; and I admit there are intrinsic difficulties in the way of laying down any general rules by which to distinguish between the two kinds of cases. Each must depend upon its own circumstances, and be disposed of with due regard to the inviolability belonging to all private contracts."

In the Middlesex Turnpike case (5) it was held that where the directors of a turnpike corporation, with the assent of the corporation, procured an act of the legislature altering the course of the turnpike road, one who before such alteration had subscribed to the stock was released from his subscription.

In Clearwater v. Meredith (6), Clearwater had sold some land to defendants and taken in payment stock in the Short Line Railway, the defendants guaranteeing to Clearwater that the stock would be worth par at a specified date in the future. The stock not being worth that figure at the date fixed, Clearwater brought his action on the guaranty. The original act incorporating the company contained no provision authorizing the corporation to consolidate its stock with the stock of any other corporation. Prior

to the purchase by Clearwater a general statute was passed providing that "such railroad companies are authorized to merge and consolidate the stock of the respective companies making one joint stock company of the two railroads thus connected." The Short Line Railway under this statute consolidated with a second railway, making one company of the two. Plaintiff had consented to the consolidation. The Court held that the guaranty of defendants was as to the value of the stock of the Short Line Railway, not the stock of a different corporation formed by such consolidation. That the act authorizing consolidation was permissive not mandatory, and that the consolidation was a fundamental change in the corporation which could not have been carried out without plaintiff's consent, and as he had consented to the consolidation which operated to destroy the stock of the Short Line Railway, the guarantors were released. In considerating the question, the Court, through Mr. Justice Davis, says:

> "The power of the legislature to confer such authority cannot be questioned, and without the authority railroad corporations organized separately could not merge and consolidate their interests. But in conferring the authority the legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an obvious purpose to do so, the act would have been illegal for it would have impaired the obligation of a contract. There was no reservation of power in the act under

which the Railway was organized, which gave authority to make material changes in the purposes for which the corporation was created, and without such a reservation in no event could a dissenting stockholder be bound. When any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed shall be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities and it may be new hazards are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit. But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking. The act of the legislature of Indiana allowing railroad corporations to merge and consolidate their stock was an enabling act—was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done, and which without that consent could not be done at all. By virtue of this act the consolidations in the plea stated were made. Clearwater, before the consolidation, was a stockholder in one corporation, created for a given purpose; after it he was a stock-

holder in another and different corporation, with other privileges, powers, franchises and stockholders."

In Bank v. City of Charlotte (7) it is held that the amendment of a charter of a railroad corporation, providing that its contemplated line shall be split in two and each part operated by a separate and distinct corporation, was a fundamental change.

In New Haven & Derby R. R. Co. v. Chapman (8), it is said (p. 71):

> "It is not easy to establish a general rule by which it may be seen at a glance to which class any given case belongs. Each case must in a measure depend upon its own circumstances."

In cases (8) to (16) changes more or less radical in the location of railway lines were held to be fundamental.

In Kenosha, Rushford & R. I. R. R. Co. v. Marsh (9), it was held that a law passed subsequently to the incorporation of the Railroad Company, changing the line of road to entirely different territory, made a fundamental change. The Court says:

> "It may reasonably be assumed that every association which undertakes the accomplishment of a particular enterprise intends to make such changes as experience may show to be necessary for its succesful prosecution. and if this may be assumed, then, although such changes were of course not originally provided for, yet they may fairly be regarded as so far incidental to the original purpose as to be with-

in the scope of the authority which each member has conferred upon the corporation to bind him by its action whenever the necessary legislative consent is obtained."

On the other hand

In Zabriskie v. R. R. (17), where after the organization of a railroad company a general law was passed in 1851, empowering all railway companies "at any time by means of their subscription to the capital stock of any other company or *otherwise*, to aid such company in the construction of its railroad, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid," it was held that this act authorized the defendant railroad to guarantee the bonds of the connecting road, and the Court said:

"Both of these acts are general acts, and were designed to enlarge the faculties of these corporations, so as to promote their utility, and to enable them to accomplish with more convenience the objects of their incorporation. This act of 1851 does not divest any estate of the company, or make such a radical change in their constitution as to authorize the members to say that its adoption without their consent is a dissolution of the body."

In Buffalo & N. Y. City R. R. Co. v. Dudley (18), the original charter of the corporation authorized the construction of a railroad from Barnesville to Attica, a distance of only sixty miles. An act of the legislature accepted by the corporation amended the charter so as to authorize the extension of the road

from Attica to Buffalo, a distance of thirty-one miles, changed the name of the corporation, and increased the capital stock from $750,000 to $1 500,000. This was held not to be such a fundamental change as to relieve the subscriber to the stock of the corporation. The Court says:

> "The change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation remaining still the same. It may be admitted that under this reserved power to alter and repeal, the legislature would have no right to change the fundamental character of the corporation, and convert it into a different legal being, for instance a banking corporation, without absolving those who did not choose to be bound. But this they have not attempted to do."

In Payson v. Withers (27) it was held that an increase in the capital stock from $1,000,000 to $5,000,000 was not a fundamental change.

In Irvin v. Turnpike Co. (19), Gibson, C. J., held that where a pike road was badly located by the first act of incorporation, an amendment to the corporate charter making partial changes in the location was not a fundamental change.

In Banet v. The Alton & Sangamon R. Co. (21), where the charter of a railroad corporation was amended by partially changing the location of the railway, but leaving the general purpose substantially the same, the Court says:

"It follows from these authorities that an alteration in a charter may be so extensive as to work a dissolution of the contract of subscription. An amendment which essentially changes the nature or objects of the corporation will not be binding on the stockholders. A corporation formed for the purpose of constructing a railroad cannot be converted into a corporation to construct an improvement of a different character, without the consent of all the incorporators. A road intended to secure the advantages of a particular line of travel and transportation cannot be so changed as to defeat the general object. The corporation must remain substantially the same and be designed to accomplish the same general purposes, and subserve the same general interests. But such amendments of the charter as may be useful to the public and beneficial to the corporation, and which will not divert the property to new and different purposes, may be made without absolving the subscribers from their engagements."

In Sprague v. Illinois River R. Co. (20), the Court says:

"It is true that the original purpose or object of the corporaton may not be entirely changed or abandoned and a new one undertaken—such as a railroad abandoned for a canal or line of steamboats, or possibly one railroad route abandoned and another in an opposite direction, and which could have no affinity to or connection with the first, adopted; but we know of no instance where the mere limitation or enlargement of the original plan or purpose has been held not to be within the implied powers of the majority or controlling authority."

In Everhart v. The West Chester & Phila. R. Co. (22), it is held that a change in the charter of a railway company by which the corporation was authorized, for the purpose of raising means to make and equip the road as originally contemplated, to issue preferred stock, did not constitute a fundamental change.

In Cross v. Peach Bottom Ry. Co., (23), it is held that an extension in the line of the railway did not constitute a fundamental change.

In Miller v. Insurance Co. (26), an insurance company was organized with power to insure against accidental injuries to persons "in travelling." Later an act was passed authorizing it to "make insurance against disabilities to persons by sickness or disease or other bodily infirmities," disability being "incapacity." This amendment was accepted by the corporation, though not by unanimous vote of stockholders. It was claimed to be such a fundamental change as to require unanimous consent. While the case does not necessarily turn on the decision of this point, the Court says:

> "With reference to what are auxiliary amendments the cases seem in hopeless conflict. There are cases going so far as to hold that any alteration, no matter how immaterial, which in any way affects the contract between the corporation, and its stockholders is to be regarded as fundamental. The case of Zabriskie v. Hackensack 18 N. J. E. 185, is a leading case for this doctrine. But the weight of authority seems to sustain a more moderate and reasonable view,

and to support the doctrine that if the amendment does not change the character of the business, and simply authorizes its reasonable extension upon the lines of the original project, that a majority of the corporators, and in some instances the directors alone may accept and conclude all the stockholders by their action. In view of the consequence imposed by our act when an amendment is proposed, both to the corporation itself as well as to the stockholders incapable of consenting, it would seem to be the sounder rule that only very material amendments radical and vital in their character should be regarded as requiring unanimous adoption."

In Picard v. Hughey (28), it appears that the Hillsboro Gaslight Co. was originally organized with power to erect "gas works for the manufacture and sale of gas for the streets and public and private buildings of the incorporated village of Hillsboro, Ohio."

Under a statute in force providing that the charters of corporations might be amended in any way, except that no such amendment should change substantially the original purposes of the corporation, the corporation amended its articles so as to authorize it to manufacture electricity in addition to gas. The Court in holding that this amendment did not substantially change the original purposes of the corporation says of the corporation:

"The obvious purpose of its creation was to manufacture and sell light to that village and its inhabitants, but it chose, in the first instance

to ask the state for authority to furnish a particular kind of light, and that authority and no other was given. Whether at that time any other means of lighting the streets of our towns and cities were known, is not material; for whether there was or was not, the charter of this corporation then limited its right to the production and sale of gas, and of course it had no power to do anything else. In the year 1888 the corporation sought to enlarge its powers by amending its charter, and to that end applied to the state for and obtained authority to produce and sell to the same village and the same inhabitants, and for the same purpose—i. e. to light the streets, etc., of the village of Hillsboro, a different agency, known under the name of electricity. * * * The ultimate object or purpose for which each agency is employed is to provide light. Originally the Hillsboro Gaslight Company sought to accomplish this object by means of manufactured gas. Afterwards it was discovered that this object could be in some respects more satisfactorily accomplished by electricity."

However much the Courts may differ as to what in fact constitutes a fundamental change, these principles are found in all these cases.

1. *What is a fundamental change in the character and purpose of the enterprise in which the corporation is engaged is a question to be determined from the facts and circumstances of each case.*

2. *To be considered fundamental the change must be more than an alteration or modification in*

the manner and method of transacting the corporate business. There must be such a radical change in the character of the business itself, as to constitute a new enterprise.

3. *The underlying principle of the rule is that a member or stockholder may not be required to engage his capital in an enterprise to which he has never assented.*

What were the changes effected by the reorganization of August, 1901, and were these changes a fundamental departure from the purposes of the corporation?

In considering the nature and extent of the changes effected on August 5, 1901, the reorganized corporation of August 6, 1901, must be compared not with the corporation as it existed in 1880 or in 1892 or in 1898, but with the corporation as it existed on August 4, 1901. If the amendments of December 24, 1898 and the conduct of the company's affairs during the second period of its history, are held to violate appellants' contracts, this Court will never reach the question now under consideration. But if the changes of 1898 were valid and binding when made, or subsequently became so as to these appellants, by the application of the principle of estoppel, then the Court will consider the nature of the changes made on August 5 1901, and in doing so must necessarily assume that all changes in the conduct of the company's affairs made up to that time were valid. It is, therefore, a comparison between

the nature of the company's business and its powers after August 5, 1901, with its powers and the nature of its business immediately prior to that date, which must be made.

As the act of 1901 provided that any assessment company accepting its provisions should be governed solely by that act, as to all future business, the company by such acceptance relinquished the power to write assessment contracts. This affected the defendant company in the following respects:

1. It lost the power (which it still possessed after the amendments of 1898) to issue new contracts like the appellants'.

2. In all its policies thereafter issued, the "safety clause" was necessarily omitted.

3. The duty of maintaining for all its policies a legal reserve, based on the experience tables of mortality on a basis of 4 per cent, compound interest, which it had imposed on itself by contract with each holder of a Guaranteed Option Policy became a statutory obligation.

The loss of power to issue new contracts similar to appellants' meant nothing. The power was useless and had not been exercised for more than two years and a half for reasons and as the result of conditions already explained, which made it impracticable to ever again exercise it. The disuse of this power was an accomplished fact long prior to the reorganization of 1901.

Furthermore, the power of amendment contained in the articles under which Trubey's contract was written, clearly contemplated that the company

might in the future modify its plan and write all new business on a different form of contract. The mere loss of this obsolete power therefore did not of itself amount to a fundamental change in the character and purposes of the corporation, nor was it a change not provided for or contemplated in the original articles.

Nor did the mere assumption of the statutory obligation to maintain a 4 per cent reserve amount to a fundamental change. The company under its former constitution had assumed the same obligation by contract.

The only remaining change effected was the omission of the "safety clause" in policies thereafter issued. By this change the company changed the system of collecting premiums from members who thereafter became such. The liability of the members to whom policies were thereafter issued, to contribute to the company, was necessarily limited to a fixed sum. In other words instead of having the right to call on the members for additional payments in case the premiums stipulated for in the policies be insufficient, the company must depend wholly on the premiums fixed in the policy. But as the premiums provided for in the Guaranteed Option Policies were based on the mortality tables, and were substantially old line rates, and were sufficient to mature each policy, it was never contemplated that the safety clause would ever be put into operation, and by omitting it the company was deprived merely of a right which it was never contemplated would be exercised.

The actual changes effected by this reorganization of 1901 were theoretical rather than practical.

So much for the details of the changes made in this case. As the rule of law requires that the exact nature of the change shall be determined from the particular facts of each case, this seems to be the proper point of view.

Looking at the question from a somewhat broader point of view, the change from an assessment to a legal reserve company was not a fundamental one requiring unanimous consent, within the rules established by the Courts.

a. The change made was not in the character of the business, but merely in the manner of transacting it. The original purpose of the corporation, to-wit, the insurance of the lives of its members on the mutual plan, remains unchanged. It is still a mutual company. The members retain their voice in the management of the company's affairs. The character of the risks it insures against remains the same. No new enterprise has been undertaken, within the meaning of any of the decisions. The company has merely made such changes in the mode of conducting the business for which it was originally organized, as experience has shown to be desirable and necessary. It is necessarily implied that every member of a mutual insurance company shall pay the cost of his insurance. The change was merely in the time and manner of collecting this cost from the members. In its original charter the corporation adopted a particular method of collecting from its members the premiums necessary to pay for the in-

surance. Experience having shown that method inefficient, the company changed it. Instead of its members being required to pay the cost of their insurance in the form of mortuary assessments, the cost is computed in advance on mathematical principles, which experience has shown to be correct, and the cost is paid by the member in the form of level and stipulated premiums, payable at stated periods. In this way the member makes payments in advance and the company is enabled to accumulate a reserve to enable it to mature its contracts. As the company is operating on the mutual principle the surplus will presumably be returned to the members in the form of dividends.

Attention is again directed to the fact that it was never contemplated that this company should exact from its members merely sufficient payments to meet the current expenses and death claims. Its articles have always provided for the accumulation of a reserve out of the excess of mortuary assessments.

The decisions above cited hold that it is implied in the case of every corporation that the majority of its members may make such changes as experience may show to be necessary for the successful prosecution of the company's business and in furtherance of the general objects and purposes of the corporation. And that is all that has been done in this case.

In determining whether a change from the assessment to the legal reserve plan is within the implied power vested in the majority of the members of co-

operative life insurance companies the Court may properly consider what has been the universal practice and understanding in this respect in the past, with reference to which the member must be held to have contracted. That such a power exists has been the universal understanding among life insurance companies and legislative bodies, and it is a matter of common knowledge that such changes have been frequently made, and that many states have enacted laws to aid them.

b. A feature of the present case in which it differs from any of the adjudicated cases on the question of what constitutes a fundamental change, is the two-fold nature of the relation of the members to the company.

In Condon v. Mutual Reserve F. L. Ass'n, 89 Md. 99, 114, it is said:

> "The policy holder in a mutual insurance association stands in a twofold relation towards the company. He is a policy holder and he is a member. Growing out of this, as well as altogether apart from it, there is a distinct relation of creditor, but with this latter we are not concerned. He is alike insurer and insured, but in both capacities he is a member, and it is solely because he is a member that he occupies either of these positions. His liabilities as insurer and his rights as insured depend wholly upon the obligations and the conditions of his membership."

In one respect his relation to the company is anal-

ogous to that of a stockholder in that he has a voice in the government of the corporation. But his principal and only financial relation to the corporation is that of insured, and his rights and liabilities in that relation depend wholly on the terms of the particular contract of insurance which each member holds.

If a change is made in the business of a stock company, it affects equally all the stockholders. It is impracticable to provide that the business of such a company shall be of a double character, and that the new business shall be conducted merely for the benefit of the assenting stockholders, leaving the non-assenting stockholders in their original situation.

In the present case the members of the corporation were not required to accept policies on the new plan, nor was their insurance placed upon the new plan. They were given the option to transfer, but if they desired to retain their old contracts they were permitted to do so. The contracts of the members remaining on the old plan, therefore, are still assessment contracts. Their rights and obligations as expressed in their contracts have not been altered in any respect. It is only in a very limited and indirect way, that they are interested in the changes made. They have not been required to engage in any new enterprise. It is true the success or failure of the company would affect its ability to perform their contracts, but in this respect they stand in no different position than any creditor of a corporation, and we are not aware of any case in which it has been held that a contract creditor of a corporation has a

right to prevent the corporation from making even a fundamental change in the character of its business, on the ground that the change might impair the ability of the corporation to pay its debts.

c. Those cases which hold that the creation of one or more distinct corporations out of the old is a fundamental change have no application to this case. The corporate identity was never changed.

Muller v. State Life Ins. Co., 97 Indiana App. Ct. R. 45.

Miller v. English, 21 N. J. Law 317.

Wilson v. R. R. Co., 21 Gratt. 654.

d. It was argued by appellants in the court below that the original plan was shown to be a failure, and instead of modifying that plan so as to perpetuate the corporation the members had a right to insist that the company should be wound up. This argument overlooks the essential nature of a life insurance company. In the case of an ordinary business corporation where its method of conducting the business is found to be unsound, its affairs can be wound up and its shareholders permitted to withdraw the remains of their capital without hardship. In such case the dissolution of the corporation does not of itself work any financial loss, and the members may invest their capital in a more profitable enterprise. But the nature of the business of life insurance forbids such a step. The basic principle on which all life insurance companies are operated is permanency. In case of dissolution a large proportion of the members are, by reason of impaired health, ad-

vanced age, or altered financial conditions, wholly unable to procure new insurance elsewhere. The very act of dissolution therefore entails serious financial loss to many members and their families. It is for this reason that it is implied from the nature of the business that a life insurance company shall be a permanent institution. And it must be implied in the contract of the members, especially where, as in this case, amendments to the plan are contemplated in the original articles that the majority of the members shall have the power to make changes in the mode of transacting the business which are shown to be essential, to protect the interests of its members and place the company on a sound and permanent basis, and to accomplish the purposes of its organization.

In the case of Supreme Lodge Knights of Pythias v. Knight, 117 Indiana 489, the syllabus is as follows:

> "Deceased held a certificate of membership in the insurance department of an order to which he belonged. The plan of the second rank, of which he was one, provided that members should be assessed $1.00 at each death of a member, the fund thus raised being applicable only to losses in that rank. The certificate stipulated that it should be governed by the laws of the order then in force or thereafter enacted and the constitution provided that it and the by-laws should be amendable by the supreme lodge. Deceased's certificate stipulated for the payment on his death to plaintiff of $2,000.00 or if there should be less than 2,000

members of that rank, then only $1.00 for each member. The number of members increased to 16,000 when by amendment of the constitution and by-laws, a new rank was established with an assessment based on life expectancy, which was preferable to the second rank for young, but more expensive for old men, and the younger members of the second rank were transferred so that at deceased's death, three years later, only 173 members of the second rank remained, he having in the nine years of his membership paid in $240.00. The new scheme was adopted in good faith to benefit the order in general. Both deceased and plaintiff upon learning of the new scheme, notified the Supreme Lodge that they protested against it. Held, that the change was not a violation of the contract, and within the scope of defendant's powers, and that plaintiff could recover only $173.00 on his certificate."

While this Indiana case goes much further than it necessary to go in the case at bar, the principles applied by the court are applicable here and are stated as follows (p. 491):

"The third paragraph of the complaint * * * proceeds on the theory that the governing body of the order, by establishing a new class and offering more advantageous terms to members of the order who would enter it, so depleted the class to which the assured belonged as to reduce the value of the certificate to $173.00 and for that reason the appellee is entitled to recover the difference between the value of the policy represented by the members that remained in the class and the maximum sum

named in the certificate." * * *

"It (the answer) avers that the constitution and by-laws were changed by the representatives of the members of the order so as to create a fourth or graded class, and that these amendments were made at a regular session of the governing body of the fraternity. * * * It alleges that the amendments were made in conformity to the constitution and by-laws and in good faith, and for the best interests of the order" (p. 493). * * *

"There was no bad faith. There was on the contrary a purpose to advance the interests of the order and the means chosen to effect that purpose were not founded on a mere arbitrary exercise of power, for very substantial and very good reasons support the action of the order in changing the system of insurance. All things indicate good faith and an honest purpose"; (p. 495) * * *

"Associations and corporations have a right to change their by-laws when the welfare of the corporation or association requires it and it is not forbidden by the organic law. The duly chosen and authorized representatives of the members alone are vested with the power of determining when a change is demanded, and with their discretion, courts cannot interfere. Were it otherwise, courts would control all benevolent associations, all corporations, all fraternities. It is only where there is an abuse of discretion, and a clear unreasonable and arbitrary invasion of private rights, that courts will assume jurisdiction over such societies and corporations. With questions of policy, doctrine or discipline, courts will not interfere" (p. 497). * * *

"To justify interference by the courts and warrant the overthrow of by-laws enacted in the mode prescribed by the by-laws it must be shown that there was an abuse of discretion or that the by-law is so unreasonable as to be void. *We do not affirm that a benefit society may by a change in its by-laws arbitrarily repudiate an obligation created by a policy of insurance; but we do affirm that where a change is regularly made in its by-laws and the motive which influenced the change is an honest one to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change no actionable wrong is done the members or their beneficiaries.* It may sometimes happen that the interests of an individual or of a few individuals may be impaired, but it is the right, and indeed it is the duty of the society to protect the interests of the many rather than of the few. Persons who become members of such societies must take notice of this, and one person cannot therefore demand that the welfare of the society and the interests of the many be sacrificed for his sole benefit. In the case before us, the change from one plan to another was not an arbitrary or unreasonable exercise of power; nor was it the repudiation of a debt, nor the destruction of a vested right; it was not unreasonable because it may well be that the system of insurance originally adopted which gave no heed to age, was so infirm as to be incapable of long endurance. It was not arbitrary because the by-laws reserved the right of amendment and a desire to promote the welfare of the society brought about the change. It was not the repudiation of a debt, because the

right to the avails of assessment provided for by contract was not taken away," etc.

In using the word "by-law," the Court referred to the constitution framed by the corporation.

c. It may be urged that the implied power to amend the corporate charter was vested in a majority of the members, and that the statute of 1901 authorized the reorganization by a two-thirds vote of all votes cast at the meeting, which might under certain conditions be less than a majority of all the members, and that for this reason the statute is invalid.

This argument is based on a misconception of the purpose and meaning of the statute. It is merely an enabling act. The implied power of the majority to make changes in the charter of the corporation in furtherance of its general purposes was not created by this statute. It has always been a part of the contract of the members. As between themselves this power has existed from the date of the organization of the corporation. The legislative consent may have been necessary to its exercise, and this statute was enacted not for the purpose of creating such a power, but merely to give legislative consent to its exercise. The adoption of a resolution of incorporation by a two-thirds vote of all votes cast satisfies the condition precedent which the legislature imposed as between the corporation and the state. The statute, however, provided that nothing therein contained shall impair or operate to impair the obligation of any contract. The plain

meaning of this provision is that the corporation should not only comply with the conditions prescribed by the legislature, but should also comply with the terms of the contract between the members. If, therefore, the contracts between the members and the corporation required that these amendments must be adopted by a majority of all the members it was the legislative intent that the consent of a majority of the members should be obtained. That was done in this case. The number of votes cast in favor of this amendment represented more than a majority of the members. In making these amendments, therefore, the corporation complied with the conditions prescribed by the State, because two-thirds of all votes cast were in favor of the amendment, and it also complied with the requirements of the members' contracts, and with that provision of the statute which stated that no contract should be impaired because a majority of all the members voted in favor of the reorganization.

But if this interpretation be not accepted the appellants are not in a position to attack the validity of the statute on this ground. It is apparent that two-thirds of all the votes cast at a meeting might under some conditions represent less than a majority of all the members. It is equally clear that under other conditions two-thirds of all the votes cast at a meeting might represent more than a majority of all the members, in which case the legislative requirement would be more severe than that implied in the contracts of the members. It follows that the legislative requirement in regard to the number

of votes necessary to effect a reorganization does not necessarily give the power to reorganize to less than a majority of all the members. Under certain conditions only it might so operate. Under the facts of the present case it did not so operate. The legislative requirements of a two-thirds vote exceeded the requirement implied in the members' contracts.

It is well settled that no individual has a right to attack the validity of a statute unless his own rights have been impaired by it. The appellants may not attack the validity of this statute because it might, under certain conditions, and in some other case, operate to impair the rights of other individuals.

Cooley's Consitutional Limitations, 5th Ed. page 197.

Hartford Fire Ins. Co. v. Perkins, 125 Fed. 502.

f. If the law of 1901 should be interpreted to unconditionally authorize the change from the assessment to the legal reserve plan, on vote of less than all the members, this case would then turn on the validity of such legislation.

While this statute is permissive, not mandatory, in its provisions, it may nevertheless be considered an exercise by the state of its police power over financial institutions in which the public are generally interested.

Black v. Delaware & Raritan Canal Co., 24 N. J. E. 455, 472.

To make such legislation mandatory would be to legislate some companies into statutory insolvency.

The power of legislatures to regulate the business of insurance is undoubted.

Chicago Life Ins. Co. v. Needles, 113 U. S. 574.

The courts have generally upheld the validity of laws which prescribe the exact terms which all contracts of fire insurance shall contain, and the statute books of the various states contain laws regulating to a greater or less extent the nature and terms of life insurance contracts. The business of assessment insurance has been prohibited entirely by Massachusetts.

In the solvency and stability of life insurance companies the public have a large interest. Next to the banking institutions they are the most important financial organizations in the country. The general failure of a number of life insurance companies would be a financial disaster only exceeded by the general failure of banks. Within the last quarter of a century a large number of assessment or co-operative life insurance companies were organized in this country. Hundreds of millions of insurance contracts were issued by them. For some years they were successful, but the plan was shown to be unsound in practice, and numbers of these companies became insolvent, and many more were threatened with a similar fate. The legislatures of many of the states recognized the situation and adopted legislation to remedy this condition by enabling the companies to go on the "old line" basis, by a partial vote of their members. Statutes similar to the Minne-

sota law are in force in

Indiana (Sections 4894 Ll, 4894 ml, 4894 nl. Vol. 2, Burns Ann. Ind. Stat. Rev. of 1901.)

Iowa (Code of Iowa, Sec. 1784 j) Supplement of 1902.

Mass. § 65 ch. 118, p. 1152, Vol. 2, Revised Laws of 1902; paragraph 4th. Sec. 11, Ch. 118, p. 1124.

Michigan (Compiled Laws of 1897, § 7204).

Missouri (Sec. 7930, Revised Statutes 1899).

New Jersey (Chapter 7, Laws of 1899).

New York (§ 52, Chapter 690, Laws of 1892, as amended by Chap. 725, Laws of 1893, and Chapter 722 Laws of 1901).

Ohio (Sec. 3631—27 Annotated Statutes Bates' 4th Ed).

Wisconsin (§ 4, Chapter 270, Laws of 1899).

Under these laws, as is shown by the testimony of Actuary Wolfe, a large number of companies have gone onto the legal reserve basis, and have gone through substantially the same transition as has the defendant company. So far as we have been able to ascertain, the validity of such statutes and of the change of plan made under them has never before been questioned. For this court to declare the Minnesota statute unconstitutional, or the change of plan made thereunder a fundamental change in the purpose of the corporation, requiring unanimous consent of the members, would be to dissolve not only the fifteen or twenty millions of insurance contracts issued by the defendant company, but would

inevitably lead to the dissolution of hundreds of millions of insurance contracts issued by other companies under similar statutes. The institution of suits like the present one would become a profitable industry.

VII.

The only relief demanded in this suit is the dissolution of defendant corporation, the sequestration of its assets, and the appointment of a receiver for that purpose, in other words, the "winding up" of the corporation. No other relief could be granted and none other was asked for in the lower court; and we assume that is what will be asked of this court. It is plain no other relief would accomplish the purpose for which this suit was instituted, or produce the returns desired by the appellants.

The changes complained of were accomplished before the commencement of this suit, and the time for an injunction is passed. Furthermore this company has gone too far in its present course to retrace its steps. To enjoin the further prosecution of its business on the present plan would put the affairs of the company in hopeless confusion, and the necessary effect of such a decree would be to require the appointment of a receiver to wind up its affairs.

a. Has the lower court or this court any jurisdiction to grant this relief?

It is well settled that a court of equity has no inherent jurisdiction to wind up and dissolve a corporation and sequestrate its assets for that purpose

at the suit of a member or stockholder. The jurisdiction of a court of equity relating to receivers of corporations, in the absence of express statutory authority, is confined to the appointment of receivers to apply the corporate assets to the satisfaction of the claims of creditors, where the claims have been reduced to judgment, and execution has been returned unsatisfied, which proceeding is in the nature of an equitable execution; or to the appointment of a receiver pendente lite, to preserve the corporate property pending the litigation, which is a mere auxiliary remedy.

High on Receivers, Sec. 288, 3rd Ed.
U. S. Trust Co. v. R. R. Co., 101 N. Y. 478, 483
Republican Silver Mines v. Brown, 58 Fed. 644-648, S. C. 7 C. C. A. 412.
Strong v. McCagg, 55 Wis. 624.
Hinckley v. Pfister, 83 Wis. 64, 84.

The jurisdiction now frequently exercised by courts of equity to wind up and dissolve corporations and sequestrate their assets at the suit of stockholders, and appoint receivers to divide the assets among creditors and stockholders, it derived entirely from express statutory provisions. In the absence of such statute the jurisdiction of a court of equity never extended to winding up a corporation and appointing a receiver for that purpose, *at the suit of a member or stockholder*. If the Circuit Court had any jurisdiction to grant the relief asked for in this case, it can only be by express statutory enactment.

There is no act of Congress nor statute of Minne-

sota which has enlarged the equity jurisdiction of the United States Circuit Court in Minnesota so as to authorize the relief asked for in this case. The only Minnesota statutes relating to this subject are found in Sections 5889 to 5911, General Statutes of 1894.

(The Insurance Code of Minnesota,—Sections 7 and 8 of Chapter 175, General Laws of 1895,—empowers and directs the Insurance Commissioner and Attorney General to institute proceedings to wind up domestic insurance companies which become insolvent or violate the law, or exceed their powers. This statute does not affect the present case, unless indeed the power thus vested in the insurance commissioner was intended to be exclusive.) We refrain from quoting these sections at length, as under the rules of this Court the appellants are required to set it forth in their brief if they rely upon it.

Section 5897 provides that on the complaint of a creditor whose claim has been reduced to judgment, upon which an execution has issued and been returned unsatisfied, the District Court may appoint a receiver and sequestrate the corporate assets. This provision does not cover this case nor create a new remedy.

Section 5899 relates to actions instituted by the Attorney General to forfeit franchises of railroad and other corporations.

Section 5900, et seq., relating to banking and insurance corporations, provides that whenever such a corporation becomes insolvent, or fails to pay its

evidences of debt on demand, or violates any of the provisions of its act or acts of incorporation, or any other law binding on such corporation, proceedings may be instituted to enjoin the further prosecution of its business, to wind up the corporation and sequestrate its assets by the appointment of a receiver, and that such suit may be instituted by the attorney general in behalf of the state, or on complaint of "any creditor or stockholder."

It is plain under the rule in Scott v. Neely, supra, that insofar as this statute gives such remedy to a general creditor, it cannot be enforced in the federal courts and whether any remedies given by it may be enforced in those tribunals is a matter of grave doubt for several reasons. But assuming that the remedy there granted to a stockholder might be enforced in the federal courts, and that a member of a mutual company is a "stockholder," the statute has no application to the present case. The defendant corporation is not insolvent, nor has it refused to pay any debt on demand. It is apparent also, considering all the provisions of the act together, that the words "violate any of the provisions of its act or acts of incorporation, *or any other law* binding on such corporation," only have reference to a violation of the statutes of the state under which the corporation is organized, or any other *statute* binding on the corporation, the penalty for which would be a forfeiture of its corporate franchises, and the dissolution for this reason if for a *wrong against the state*, which the attorney general may take advantage of. This corporation has never violated the

law under which it was incorporated, nor any other law, nor committed any wrong against the state. *It has had legislative* consent to all its acts. The wrong, if any, which appellants have suffered can be nothing more than a breach of their contract with the corporation.

As the statute in question only authorizes the winding up of a moneyed corporation at the suit of a stockholder, for insolvency or violation of state law, and as no such conditions exist in this case, the jurisdiction of the lower court does not extend to granting the relief asked for.

b. There are two other considerations which should impel this court to deny relief in this case:

1. The appellant Trubey has a remedy at law, which seems to be adequate, as that term is used in equity. By reason of the twofold nature of the member's relation to the company, already referred to, if his contract has been broken he is a creditor of the company.

The rule is well established that the relation between a mutual insurance company and its members is that of contract, and where the company fails or refuses to carry out its contract the insured may sue at law for damages.

Ebert v. Mut. Res. Fund Life Assn., 81 Minn. 116.

Watts v. Phoenix Mut. Life Ins. Co., 16 Blatch. 228.

Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 727, 741.

Speer v. Phoenix Mut. Life Ins. Co., 43 Hun. 322.

If Trubey in his capacity as a member had instituted a suit to enjoin the contemplated changes, in time to make that remedy effective, it may be that his right to maintain an action at law for damages in the event that the changes were made, would not have been considered an adequate remedy nor a satisfactory substitute for the injunction. But where the remedy by injunction is no longer available, that remedy at law is adequate. If a receiver is appointed Trubey can merely file his claim as a policy holder against the corporate assets. In an action at law, if his contract has been broken, he would recover the value of the policy at the time of the breach. In either case the financial result would be the same, leaving out of consideration the profit he expects to derive from being interested in the conduct of a receivership proceeding.

2. The other consideration is the character of this litigation. It is a disagreeable subject and we need only refer the court to the records, the statement of facts, and the opinion of the court below. We established the fact that this is what is commonly described as a "wrecking suit," instituted by an insignificant interest, in reckless disregard of the interest and wishes of the members of the company. That Trubey is the only member now in good standing, and who was so at the time of the reorganization of 1901, back of this litigation, was convincingly shown. The head and front of the whole proceeding is the man Carter, described by the lower court as a "dishonest rascal," and who never has

been a member. Some of Carter's acts set forth in the testimony undoubtedly were performed before Trubey and his present associates became interested in his scheme. This testimony was introduced on the theory that there was a continuing conspiracy to wreck this company, and that as Carter is still the "chief conspirator" as he called himself, his former acts in furtherance of this purpose are competent to characterize the present combination, and that by joining with him the others adopted the acts already perpetrated in furtherance of the common design. This defense goes to the equity of complainants' case, and like the defense of laches need not be pleaded.

Willard v. Wood, 164 U. S. 502, 524.
Sullivan v. R. R., 94 U. S. 806, 811.
Badger v. Badger, 2 Wall. 87, 95.

We are aware that courts will not consider a man's motive for the enforcement of a strict legal right. But it is not a strict legal right which it is sought to enforce in this case. The appellants have appealed to the equity side of this court and asked not for the enforcement of a strict legal right, but for the exercise by this court of its extraordinary powers as a court of equity. The appointment of a receiver is always a matter of sound discretion, and it is elementary that a court of equity will never exercise such an extraordinary power where great hardship and injustice would result, especially where, as in this case, the complainants has a remedy at law, the enforcement of which would injure no one.

Considering the origin and original purpose of the equitable jurisdiction it seems impossible that there can be any principle of equity which will make it necessary for this court to become the instrument to accomplish the purpose of this litigation, and do irreparable damage to thousands of members, at the suit of such a band as are behind this litigation.

See Dimpfell v. Ohio & Miss. Ry. Co., 110 U. S. 209.

In view of the existence of this other remedy, and the general nature of this suit, and the bad faith of the parties behind it, no equitable relief should be granted, even if any technical infringement of strict legal rights has occurred.

It was intended to consider at some length the effect of Trubey's reinstatement on the prior acts of the company, but this brief has already reached such a length that it is inadvisable. It may be said, however, that the reinstatement, based on new warranties as to health, constituted a new contract, and made with knowledge of all changes in the corporation amounted to a ratification, on the same principle that a member cannot question the validity of articles and by-laws in force at the time his membership begins.

WILLIAM D. MITCHELL,
Solicitor for Appellees.

JARED HOW,
CARL TAYLOR,
TIMOTHY R. PALMER,
Of Counsel.

APPENDIX.

Chapter 184 General Laws of 1885.

An Act to provide for incorporation and regulation of co-operative or assessment life, endowment and casualty insurance associations and societies.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Any number of persons, not less than nine (9), residents of the State of Minnesota, hereafter desiring to form an organization, fraternal or non-fraternal, for the purpose of transacting the business of life, casualty, or endowment, or both life, casualty and endowment insurance upon the co-operative or assessment plan, may associate themselves together, and effect such organization as hereinafter prescribed, and not otherwise.

Sec. 2. Such persons shall file in the office of the insurance commissioner a declaration, signed by each of the corporators, and duly acknowledged before an officer authorized under the laws of this state to take the acknowledgment of deeds and shall therein express their intention to form an organization for the transaction of life, endowment or casualty insurance, upon the co-operative or assessment plan, which said declaration shall also contain the proposed name of the association, corporation or society (which shall not be the same as, nor too closely resemble the name of, any other corporation, organ-

ized under the laws of this state), the place where the principal office for the transaction of its business shall be located, which shall be at some place within this state; the mode, and manner in which the corporate powers granted by this act are to be exercised; the mode and manner of electing the trustees, directors or representatives, or other persons, by whatsoever name or title designated, who are to have and exercise the general control and management of its affairs and all its funds; which election shall be in such manner as shall be prescribed by the by-laws of such corporation, association or society, or in case of fraternal societies, by representatives chosen by subordinate lodges, councils or bodies, who shall be members of such society and a majority of them citizens of this state.

* * * *

Sec. 5. Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with its members, whereby upon the decease of a member, or the maturity of a certificate, any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to the legal representatives of such member, or to the beneficiary designated by such member, which money, benefit, charity, relief, or aid are derived from voluntary donations or from admission fees, dues and assessments, or any of them, collected or to be collected from the members thereof or members of a class therein, and interest and accre-

tions thereon or rebates from amounts payable to beneficiaries or heirs; and wherein the paying, providing or rendering of such money or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid; and wherein the money or other benefit charity, relief or aid so realized is applied to the uses and purposes of such corporation, association or society, and the expenses of the management and prosecution of its business, shall be deemed to be engaged in the business of life or endowment insurance upon the co-operative or assessment plan, and shall be subject only to the provisions of this act.

* * *

Sec. 7. Every such corporation, association or society doing a life, endowment or casualty insurance business upon the co-operative or assessment plan, as herein defined, shall, on or before the first (1st) day of February of each year, make and file with the commissioner of insurance of this state a report of its affairs and its operations during the year ending on the thirty-first (31st) day of December immediately preceding. Such reports shall be upon blank forms provided by such commissioner, and shall be verified under oath by the duly authorized officers of such corporations, associations, or societies, and shall be published, or the substance thereof, in his annual report, by such commissioner, and shall contain answers to the following questions:

* * *

Fifth—The amount received from each assessment

in each class for the year.

* * *

Nineteenth—Has the society a reserve fund?

Twentieth—If so, how is it created, and for what purpose, the amount thereof, and how invested?

Twenty-first—Has the society more than one class or division?

Twenty-second—If so, how many, and the amount of indemnity in each.

Twenty-third—Number of members in each class or division.

* * *

Twenty-eighth—Aggregate maximum and minimum and average age of membership in each class or division in the society.

* * *

Sec. 19. * * * Nor shall anything in this act prevent the creation of a reserve fund by any corporation, association, or society transacting the business of life, endowment or casualty insurance upon the co-operative or assessment plan, which funds or its accretions, or both, are to be used for the payment of assessments or death losses, or for benefits. * *

CHAPTER 143 GENERAL LAWS OF 1901.

An act to amend Chapter 175 of the General Laws of 1895, entitled an Act to revise and codify the insurance laws of the state."

Be it enacted by the legislature of the State of Minnesota:

Section 1. That sections eleven (11), twenty-one (21), twenty-four (24), twenty-seven (27), twenty-eight (28), thirty-two (32), sixty-three (63), and seventy-three (73) of chapter 175 of the General Laws of 1895, be amended to read as follows:

Section 11. He shall each year compute the net value on the thirty-first day of December of the preceding year of all outstanding policies of life insurance in companies authorized to make insurance on lives in this state upon the basis of the American Experience Table of Mortality, with the interest at *four* per cent per annum, and the aggregate net value, so ascertained, of the policies of any such company shall be deemed its liability on account of its policy obligations, other than accrued claims, to provide for which it shall hold assets in secure investments of an amount equal to such net value above all its other liabilities; *and in computing such net value he shall treat and construe each policy, according to the terms and tenor thereof; provided, that policies, or certificates of any assessment company, issued on the mortuary assessment plan, prior to the reincorporation of such company, or the au-*

thorization thereof to transact life insurance business, under the provisions of this act, shall at all times after such reincorporation or authorization, be treated and valued as one year term policies. When the actual premium charged by a company for an insurance is less than the net premium for such insurance computed according to the table of mortality and the rate of interest aforesaid, then and in every such case the company shall be charged as a separate liability with the value of an annuity, the amount of which shall equal the difference between the premium aforesaid and the term of which in years shall equal the number of future annual payments due on said insurance at the date of the valuation. *Provided, however*, he may accept the valuations made by the insurance commissioner of the state under whose authority a life insurance company was organized, when such valuations have been made on sound and recognized principles and legal basis, or its equivalent as above; *provided*, the company shall furnish to the insurance commissioner of this state a certificate from the insurance commissioner of such state, setting forth the value calculated, on the date designated above, of all the policies in force in the company on the previous thirty-first day of December. Every life insurance company doing business in this state during the year for which the statement is made that fails to promptly furnish the certificate aforesaid shall be required to make full detailed lists of policies and securities to the insurance commissioner of this state, and shall be liable for all charges and expenses consequent upon

not having furnished such certificate. To determine the liability on the contracts of insurance of an insurance company, other than life, and real estate title insurance, and thence the amount such company shall hold as reserve for the reinsurance, he may take fifty per cent or the actual unearned portion of the premiums written in its policies; but in respect to inland and marine risks he shall compute the liability thereon by charging sixty per cent of the amount of premiums written in its policies upon yearly risks and upon risks covering more than one passage not terminated, and the full amount of premiums written in policies upon all other inland and marine risks not terminated. *Provided*, that in case of fire and marine insurance companies with less than two hundred thousand dollars capital admitted to transact fire insurance only in this state, the full amount of premiums written in their marine and inland navigation and transportation insurance policies shall be charged as liability.

In valuing the assets, except cash in hand, which compose the legal reserve of a life insurance company, the real estate, the bonds and stocks shall be taken at such a value that the average annul income thereof shall be not less than three per cent of the valuation; and if any asset or investment is conditioned upon a rate of interest of less than three per cent annually such asset or investment shall be rated at its value, considering the actual income, and time it has to run, as the equivalent of a three per cent investment; loans and credits shall not be allowed for more than their face value, nor shall any asset or

investment be appraised for more than its market value. He shall allow to the credit of an insurance company in the account of its financial condition, only such assets as are available for the payment of losses in Minnesota, but may credit any deposits or funds of the company set apart as security for a particular liability in set-off to the amount charged on account of such liability; *also the amount of any lawful interest-bearing lien against, or loan upon any policy, to the extent of but not exceeding the net value or premium reserve of such policy, computed as by this act provided.* He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral or mortgages on real estate.

Sec. 21. The general provisions of law relative to the powers, duties and liabilities of corporations or their agents shall apply to all incorporated insurance companies as far as the provisions are pertinent and not in conflict with the provisions of law relative to such companies or with their charters.

Any insurance company, *not excepting companies transacting life or casualty business on the mortuary assessment and stipulated premium plan, or either thereof, may qualify and* be governed by this chapter, anything in its special charter to the contrary notwithstanding. *Provided that nothing herein contained shall impair or operate to impair the obligation of any contract, and provided further, that after such qualification the company qualify-*

ing shall be governed solely by this act; and provided further, that nothing in this act contained shall apply to any town insurance, mortuary assessment, or stipulated premium company, unless and until it shall accept and qualify under the provisions hereof; and provided further, that notice of the acceptance of said act be filed with the insurance commissioner.

Sec. 24. Any such company may adopt by-laws for the conduct of its business not repugnant to law nor to its charter, and therein may provide for the division of its board of directors into two, three, four or more classes, and the election thereof at its annual meetings, in such manner as that the members of one class only shall retire and their successors be chosen each year, or at such other time or times as the by-laws may prescribe. Vacancies in any such class may be filled by election by the board for the unexpired term. The secretary and treasurer shall severally give bonds with sureties, in such sum as the directors may require, for the faithful performance of their respective duties.

All matters proposed to be acted upon at any special meeting of the company shall be specified in the call for the same.

All investments of the funds of the company shall be made in its corporate name, and no officer of the company and no member of the committee thereof charged with the duty of investing its funds, shall borrow the same, or be directly or indirectly liable for or on account of loans thereof to others; nor shall

any director or other officer take or receive to his own use any fee, brokerage, commission, gift, or other consideration for or on account of a loan made by or on behalf of such company.

All policies issued by such company shall be signed by its secretary, or, in his absence, by a secretary pro tempore, and by its president or vice president, or, in their absence by two directors.

Such companies shall have their office in the city or town specified in their charter, and when they establish agencies in other cities or towns, all signs, cards, pamphlets and advertisements exhibited or issued by them shall specify the city or town where the company they represent is located. They shall not deal or trade in buying or selling goods, wares or merchandise, except articles insured by them on which losses are claimed, and except in replacing, rebuilding or repairing insured property, as provided in their policies, nor engage in any business other than as specified in their charters and articles of incorporation and expressly authorized by law.

Any such company may acquire and hold real estate for the convenience and accommodation of its business at a cost not exceeding twenty-five per cent of its cash assets and not otherwise, but may hold real estate acquired under the conditions of any mortgage owned by it, or by purchase or set-off on execution, upon judgment for debts due it in the course of its legitimate business.

Sec. 27. Insurance companies may be formed

or reincorporated as provided in section twenty-eight for any one of the following purposes, to-wit:

First: To insure against loss or damage to property by fire, lightning, hail or tempest on land, upon the stock or mutual plan.

Second: To make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith upon the stock or mutual plan, and to grant, purchase or dispose of annuities and endowments of any kind. *Provided*, no company transacting the business of life insurance in this state shall be permitted to take any other kinds of risks except those connected with or appertaining to making insurance on life or against accident to, or sickness of, persons, and the granting, purchasing and disposing of annuities and endowments.

Third: To insure upon the stock or mutual plan, vessels, freight, goods, money, effects, and money lent on bottomry or respondentia, against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation.

Fourth: To guaranty the fidelity of persons in positions of trust, private or public, and to act as surety on official bonds, and for the performance of other obligations.

Fifth: To insure against loss or damage to the property of the assured, or loss or damage to the life, person or property of another for which the as-

sured is liable, caused by the explosion of steam boilers.

Sixth: To insure any person against sickness or against bodily injury or death by accident; or any person, firm or corporation against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage said person, firm or corporation is responsible.

Seventh: To insure against a breakage of plate glass, local or transit.

Eighth: To insure against loss by burglary or theft, or both, or attempt thereat, or loss of money or securities in course of transportation.

Ninth: To insure against loss or damage to property of the assured by water, caused by accidental breakage of automatic sprinkler heads.

Tenth: To insure against loss or damage to live stock of the assured caused by death of the property insured.

Sec. 28. The procedure for organizing or *reincorporating* such a corporation shall be as follows:

First: *To organize a company* the proposed incorporators must be residents of this state, and not less than ten in number and shall subscribe and duly acknowledge before some officer authorized to take acknowledgments to deeds, articles of association, setting forth their intention to form a corporation; its proposed name, which must not so closely resem-

ble the name of an existing corporation authorized to transact business in this state as to be likely to mislead the public, and must be approved by the insurance commissioner; the class of insurance it proposes to transact, and on what business plan or principle; the place within this state of its location, or home office; and, if on the stock plan, the amount of its capital stock; also any additional suitable and lawful declarations or matters the said incorporators may see fit to embody therein.

Second: *Any domestic insurance company, not excepting those transacting life or casualty insurance, business on the mortuary assessment plan and stipulated premium plan, or on either thereof, may at any time qualify and reincorporate under the provisions of this act, either as a stock company, if a stock company at the time of reincorporation, or as a mutual company, if a mutual company at the time of reincorporation, retaining or adopting any name consistent herewith and approved by the insurance commissioner.*

To accomplish such reincorporation a resolution shall be adopted by a majority vote of all the votes cast by the stockholders of a stock company, or by a two thirds vote of all the votes cast by the members of any other company, at any special meeting called for that purpose, of the holding of which not less than thirty days' written or printed notice, specifying the time and place, shall have been given, or by such majority vote or two thirds vote as the case may be, at any regular meeting of such stock-

holders or members, authorizing and declaring such reincorporation, and setting forth the future corporate name of such company, which must not so closely resemble the name of an existing corporation authorized to transact business in this state as to be likely to mislead the public, and must be approved by the insurance commissioner; the class of insurance it proposes to transact, and on what business plan or principle; the place within this state of its location, or home office; and if on the stock plan, the amount of its capital stock; also any additional suitable and lawful declarations or matters the said voters may see fit to incorporate therein.

Third: The words "insurance company" must be a part of the name or title of any company organized *or reincorporated* under the provisions of this act; also the word "mutual" if organized *or reincorporated* on the mutual plan or principle. The articles of incorporation *or resolution of reincorporation*, shall also fix the place, day and hour of holding the first meeting of members or stockholders to be held thereafter, also the place, day and hour of holding the regular annual meeting of the members or stockholders, and the names of the first, or of the present, board of directors or trustees.

In case of reincorporation a full, true and complete copy, certified by the president and secretary, under the corporate seal of the company, or the resolution adopted as herein provided, and in case of organization, the articles of incorporation executed and acknowledged as herein provided, shall be sub-

mitted to and filed with the insurance commissioner, who shall, if it appears that the requirements of the law as herein have been complied with, cause such articles of incorporation, or certified copy of resolutions, as the case may be, to be recorded in a book kept for that purpose in his office, and thereupon such articles of incorporation, or certified copy of resolution, as the case may be, shall constitute and thereafter be known as the articles of incorporation of the company, subject to amendment as herein provided; and if said company shall possess the necessary qualifications, and shall have complied with all the requirements of law, said commissioner shall, without unnecessary delay, issue to such company his certificate of authority, authorizing it to do the business mentioned in its articles of incorporation in this state. The insurance commmissioner shall sign said certificate and cause the seal of his office to be thereto affixed. He shall also keep a copy of such certificate, and a certified copy of the same may be given in evidence with the like effect as the original certificate.

Any company reincorporated as herein provided shall upon such reincorporation and for the purpose of construing this act, be treated and deemed to have been formed or organized hereunder. Except as otherwise herein provided, the then, at the time of such reincorporation, existing board of directors, or board of trustees and officers of any company reincorporated under this act, shall hold office until their respective successors are elected and have qualified.

Any company organized *or reincorporated* under the provisions of this act may amend its articles of incorporation at any time, to any extent, not in violation of law, by resolution adopted by a majority vote of all the votes cast by the stockholders of a stock company, or by a two-thirds vote of all the votes cast by the members of any other company, at any special meeting called for that purpose, of the holding of which not less than thirty days' written or printed notice, specifying the time and place shall have been given, or by such majority vote or two-thirds vote, as the case may be, at any regular meeting of such stockholders or members.

A full, true and complete copy, certified by the president and secretary, under the corporate seal of the company, of any resolution of amendment, or amendments, herein authorized, shall be submitted to and filed with the insurance commissioner, who, if it appears that the requirements of law as herein have been complied with shall, without unnecessary delay, record such certified copy of resolution of amendment, or amendments, in a book kept for the record of articles of incorporation, and thereupon such amendment or amendments shall be in force and effective.

Sec. 32. (Relates to stock companies and investment of funds and is omitted as immaterial).

Sec. 63. All corporations, associations, partnerships or individuals doing business in this state under any charter, compact, agreement or statute of this or any other state, except as provided in section three, involving the payment of money or other

things of value, to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance guaranty contract or pledge for the payment of endowments or annuities, shall be deemed to be life insurance companies, and shall not make any such insurance guaranty, contract or pledge in this state, or to or with any citizen or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor the performance of which is contingent upon the payment of assessments made upon survivors; *provided, that nothing in this section contained shall apply to any contract, policy or certificate of membership issued by any corporation or company while transacting the business of life insurance on the mortuary assessment plan and stipulated premium plan, or either thereof, prior to receiving authority to transact life insurance business under the provisions of this act, but such contracts, policies and certificates shall be fulfilled and carried out according to the terms and conditions of each thereof, subject to change by the parties thereto.*

Sec. 73. Every person insured by a domestic mutual life insurance company shall be a member, entitled to one vote, and one vote additional for each *one* thousand dollars of insurance in excess of the first *one* thousand dollars, and shall be notified of its annual meetings by a written notice, or by an imprint in the form prescribed in section thirty-

seven upon the back of each policy, receipt or certificate of renewal.

Any member of a domestic mutual life insurance company may vote by proxy, provided the proxy appointment shall be in writing, and shall be filed with the company, and the filing noted in the company's books at least five days before the meeting at which it is to be used. A proxy may be revoked by the member giving it at any time, and no proxy shall be voted when and where the member giving it is present, or is represented by a subsequently appointed proxy.

Sec. 2. This act shall take effect and be in force from and after the first day of July, A. D. 1901.

Approved April 6, 1901.